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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1681

STUART M. KAPLAN, AS TRUSTEE IN BANKRUPTCY
FOR PALMER DATA CORPORATION
doing business as computerminal,
Petitioner,

VS.

BURROUGHS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, Stuart M. Kaplan, as Trustee in Bankruptcy for Palmer Data Corporation doing business as Computerminal Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed, on different grounds, the opinion of the District Court granting judgment notwithstanding the verdicts of two juries.

OPINIONS OF THE COURTS BELOW

The opinion of the District Court granting a fourth trial *de novo* is attached hereto as Appendix A to this Petition.

The opinion of the District Court vacating its order for a fourth trial *de novo* and granting judgment notwithstanding the verdicts of two juries is reported at 426 F.Supp. 1328 (N.D. Cal. 1977), and is attached as Appendix B to this Petition.

The opinion of the Court of Appeals affirming the District Court's judgment notwithstanding the verdict of the juries is reported at 611 F.2d 286 (9th Cir. 1979), and is attached as Appendix C to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 23, 1979. A timely petition for rehearing was filed on December 14, 1979, and denied on January 25, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED FOR REVIEW

Whether petitioner was denied its right to trial by jury as guaranteed by the Constitution of the United States and the decisions of this Court?

Whether, especially in the absence of any issue regarding the rulings of the District Court on evidence or instructions, this petitioner was denied his right to jury trial as guaranteed by the Seventh Amendment?

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. § 1) provides, in pertinent part:

> "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with nations, is declared to be illegal . . ."

Amendment VII to the Constitution of the United States (U.S. Const. Amend. VII):

> "Amendment VII—Civil Trials
>
> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined by any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

A. Nature of the Case

This is a private antitrust suit brought by the petitioner under Section 4 of the Clayton Act (15 U.S.C. § 15) to recover damages caused by reason of the respondent's violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

B. Course of the Proceedings Below

The Complaint was filed in March 1971.

The first trial commenced in February, 1974, before a jury. In March, 1974, after a four week trial, the jury returned a unanimous verdict in favor of the petitioner and assessed damages in the amount of $1,270,000. The judgment was entered on March 13, 1974. In May, 1974, the District Court denied the respondent's motion for

judgment NOV, denied the respondent's motion for a new trial on the issue of liability, but granted the respondent's motion for a new trial on damages.

The trial on damages commenced in October, 1974, before a jury. Prior to the trial, the District Court advised the parties that if it appeared that the damage issue could not be justly tried without the evidence relating to liability, a new trial *de novo* would be ordered. In November, 1974, after a two week trial on the damage issue, the jury returned a verdict against the petitioner. In February, 1975, the District Court ordered a new trial *de novo,* and assigned the third trial to another judge.

The third trial commenced in January, 1976, before a jury. In February, 1976, after a five and one-half week trial, the jury returned a unanimous verdict in favor of the petitioner and assessed damages in the amount of $1,162,000. The judgment was entered on February 6, 1976. In April, 1976, the District Court denied the respondent's motion for judgment NOV, but granted the respondent's motion for a new trial *de novo* because the experience of the first Judge "might be repeated were this Court now merely to set aside only the part of the verdict relating to damages." In April, 1976, the petitioner filed a Petition for Writ of Mandamus and/or Prohibition in the Court of Appeals to vacate the order granting a fourth trial. In June, 1976, the Court of Appeals denied the petition. In July, 1976, the petitioner filed a Petition for Writ of Certiorari in this Court. In October, 1976, this Court denied the Petition. In February, 1977, one month prior to the March trial date for the fourth trial and one year after the

return of the verdict in the third trial, the District Court vacated its order granting a new trial *de novo* and entered judgment in favor of the respondent notwithstanding the verdicts of the juries.

In November, 1979, the Court of Appeals, specifically *not* relying upon the factual reasoning and analysis used by the District Court, but instead making its own factual analysis, affirmed the District Court's judgment notwithstanding the verdicts.

C. Statement of the Facts

1. The Parties

Respondent Burroughs Corporation is a Michigan corporation engaged *inter alia* in the business of manufacturing and selling computers and operating computer service centers which lease computer time to industrial and business firms. In the latter part of 1969 and early 1970, Respondent operated a data processing center in San Francisco.

Petitioner Stuart M. Kaplan is the Trustee in Bankruptcy for Palmer Data Corporation, a California corporation, and the successor in interest to Computerminal Corporation, a Delaware corporation. During the relevant period Computerminal and subsequently Palmer Data Corporation operated a data processing business in San Francisco in competition with Burroughs, its supplier.

Cubit Systems Corporation, the co-conspirator, was a subsidiary of Purity Stores and, like Burroughs and Computerminal, operated a data processing center.

2. Statement of the Facts

Computerminal was incorporated in the State of Delaware in February of 1969 (DX AV; RT 936) with a capital investment of $750,000. (RT 1320a). From its inception, Leonard J. Palmer was the president and a director of Computerminal. (RT 933).

Palmer first became involved in an executive capacity in the data processing industry in 1960. (RT 867). At that time he became Western Regional Manager of Recording and Statistical Company (hereinafter "R & S"). In that position he was in charge of the R & S San Francisco based data center (which ultimately was taken over by Burroughs). During the three years that Palmer managed the San Francisco data center for R & S, annual revenues increased from $180,000 to $1,000,000. (RT 868). Burroughs representatives conceded at trial that "Mr. Palmer built R & S up." (RT 451).

In late 1963, Palmer was hired by Burroughs "to establish for Burroughs a national chain of data processing or batch processing computer centers." (RT 871). During the time that Palmer was with Burroughs he authored a comprehensive service manual setting forth management and financial techniques in relation to data processing centers, entitled "Service Center Organization and Control," which was published and distributed by Burroughs. (RT 872-73; PX 45).

In late 1964, after leaving Burroughs, Palmer co-founded Computer Service Centers, Inc., ("C.S.I.") a company formed to develop a national network of batch data processing centers. (RT 877). Shortly after its formation, Palmer became president and within four years expanded the company to nine data centers in operation in various parts of the country with annual revenues of approximately $4.5 million. (RT 878).

While Palmer was still with C.S.I., and before he came to San Francisco to start Computerminal, he was president of ADAPSO, the trade association for data processing firms throughout the United States with a membership of approximately two hundred and ten firms. (RT 907).

In March of 1969, Computerminal leased premises in San Francisco and computer equipment including a Burroughs manufactured B-2502 computer which was at that time recognized to be one of the "world's great computers" as well as one of Burroughs' best and newest products. (RT 943, 981, 2147; PX 22).

In June of 1969, Computerminal had already secured batch processing business which was "well ahead of the position" Palmer had projected for the company at that point. (RT 944:45; 1070; DX AF).

Shortly after Computerminal commenced operations in San Francisco, Burroughs in September of 1969 acquired a data processing center in San Francisco from the Univac Division of Sperry Rand Corporation (hereinafter "Univac") (RT 117; PX 21),[1] thereby becoming a direct competitor as well as a supplier of Computerminal. Burroughs paid Univac $75,000 for the physical assets of the data center but "not one penny for a customer account." (RT 306, 117-118; PX 21).

---

[1]This data center was the R & S center which Palmer "had built up." (RT 451).

Almost immediately after Burroughs commenced operations in competition with Computerminal, Burroughs viewed Computerminal as a "substantial competitive threat" to Burroughs' San Francisco operation. (RT 175-78).

Indeed, as of January of 1970, Burroughs had already lost two batch processing customers to Computerminal. (PX 20; RT 156; 189). In addition, Burroughs was unable to deter the steady migration which had commenced during the Univac operation of key personnel from their data center to Computerminal. (PX 3). Immediately prior to Burroughs' purchase of the Univac operation, Leonard Palmer "had recruited 5 key management people" from Univac's data center. As a matter of fact the developer of Churin language which was the programming language utilized for most of the batch programs processed at the Univac and subsequent Burroughs' center had gone to Computerminal. (RT 149-151; PX 3).

In a Burroughs interoffice memorandum dated January 15, 1970 from L. O. Brown, the manager of Burroughs' national network of data centers, to R. O. Bailey, Burroughs' Vice President, Browne noted the competitive threat of Computerinal in the following manner:

> "The decision of these two key managers to join L. J. Palmer's staff, presents us with a more difficult problem than if they had resigned to join a non-competitor or for that matter any competitor other than Computerminal. * * * As the situation developed Lombardi and Meredith[2] are the only 2 remaining employees

[2]"Lombardi and Meredith" referred to in the foregoing memorandum are the two key managers who decided "to join L. J. Palmer's staff."

> who have adequate systems programming and processing knowledge of certain batch customer jobs to assure proper processing results.
>
> * * *
>
> "It should also be recognized that the systems design of practically every batch program was done either by Lombardi, Meredith or Churin, and all of these individuals are now on Palmer's staff.
>
> * * *
>
> "His (Palmer's) track record to date has demonstrated his ability to secure the most capable management talent from the entire organization." (PX 3).

In addition, Burroughs regarded Computerminal as the only data center in the Bay Area which Burroughs was concerned about. (RT 139:40; 174-75). Indeed, Burroughs itself anticipated that, on the competitive merits, Computerminal would end up with most if not all of Burroughs' customers:

> "We have reviewed all of the batch accounts in an attempt to determine which accounts would be most vulnerable to Computerminal solicitation, based on the knowledge of the jobs by their employees. It is very difficult to make a precise forecast of what the impact would be of an aggressive effort on the part of L. J. Palmer's organization to pick up these accounts, but we feel we are quite exposed to the loss of more than half of the existing batch accounts. This could see us dropping from a present batch revenue base in excess of $400,000 annually to something between $125,000 and $150,000 per year." (PX 3).

As a matter of fact, Browne stated that he did not foreclose the possibility of Computerminal taking *"all* of the customers away" from Burroughs. (RT 206).

Confronted with the competitive threat of Computerminal and, in fact, believing that Burroughs could not adequately compete against Computerminal even with the "total corporate resources" of Burroughs, (RT 144-45), Burroughs embarked upon a plan which it later identified as "Plan X".

The basic thrust of "Plan X" was "to dispose of the batch processing before Computerminal took any additional customers from us." (RT 777).

Jim Lowe, Burroughs' Western Regional Manager, agreed that if Burroughs "did not sell these customers, [that] Burroughs would lose them to competition." (RT 547).[3]

Burroughs designated the program to dispose of the batch processing accounts as "Plan X". (RT 103; 190; PX 6).

The sole purpose of Plan X was attested to by Browne:

> "Q. So you came on the plan, Plan X, the *whole* idea of which was to sell them before we lose them anyway; correct?
>
> A. Yes. Plan X was to sell the batch customers." (RT 192). (See also RT 454-55).

As an initial step to prevent customers from going to Computerminal, Burroughs induced its batch customers to enter into new "contracts". As stated by Browne to Bailey in an interoffice memorandum dated February 9, 1970 (PX 4):

> "It seemed most important at that time to firm up contracts with these customers, including price increases, to ward off further attempts to steal these accounts by Palmer."

[3]Lowe identified the "competition" which would acquire these batch accounts as "in all probability"—Computerminal. (RT 547, 773-74).

These "contracts" provided in pertinent part as follows:

> "1. This agreement shall continue in effect for a period of one (1) year from the date of acceptance and shall be renewed for successive periods of one year each, unless terminated at the end of the initial period, as provided in paragraph '2' below.
>
> "2. Either party may terminate this agreement at the expiration of the original, or any subsequent one-year period by giving written notice of such termination to the other party at least 90 days prior to the expiration of such one-year period. All accrued obligations shall survive any such termination." (PX 2).

However, the "contracts" also provided that they would be considered "void" if "not accepted by *both* parties within thirty (30) calendar days." (PX 2).

Therefore, in order to "bind" the customers and prevent them from going to Computerminal on the one hand but permit Burroughs to disavow the existence of the same "contracts" on the other, Burroughs plotted to defer acceptance until after the sale of the customers and then to simply back-date the "contracts".

Thus, Browne suggested to Bailey that Burroughs:

> "Not accept the contracts until we have completed our negotiations for the sale of this business. (PX 4).
>
> * * *
>
> " . . . I am inclined to feel that our best plan for now is to hold up acceptance of these contracts until we have firmed up the deal for the disposition of the batch processing." (PX 4).

It is undisputed Burroughs did not accept these contracts within the thirty (30) day contractual time period, and the Burroughs executives knew that these contracts were therefore not valid or binding on the parties. (RT 142; 243). In addition to using this method to "ward off further attempts to steal these accounts by Palmer," Burroughs also charged higher prices. Browne attested to this fact:

> "Q. Therefore, the question again, sir, you believed the contracts were invalid; nonetheless, you charged the customers the higher prices that were contained in those contracts?
>
> A. Yes." (RT 244).
>
> • • •
>
> "The Court: Supposing that a customer had come around and asked Burroughs to give back the difference between the lower rates and the higher rates on the theory that the old contract was still in existence. What would you have told him?
>
> The witness: And we had not returned these contracts to him within the thirty days, I would have thought he would probably have a pretty good ground to ask for that." (RT 461).

Burroughs recognized that Computerminal was the best staffed, best equipped and most centrally located data center in the Bay Area and the "most logical" candidate for servicing Burroughs' batch accounts. (RT 220-21; PX 4; 7). Nonetheless, during March of 1970, Burroughs representatives met with Cubit Systems Corporation, a subsidiary of Purity Stores. (PX 6). On March 18, 1970, during one such meeting with Cubit representatives, Cubit presented Browne and Lowe with an offer for Burroughs'

batch processing customers. (PX 20). Browne indicated to the Cubit representatives at this meeting that their offer was "completely unacceptable." (PX 20; RT 585-86).

Nevertheless, one day later on March 19, 1970, during a meeting with representatives of Computerminal, Browne represented to Palmer that he "had a signed offer for our (Burroughs') asking price on the batch processing business from a major corporation." (PX 7; RT 584-85; 1020). During this same meeting, Browne also represented to Palmer that Burroughs had "signed contracts" with its batch customers. (RT 1034).

Throughout the course of his various meetings with Burroughs, Palmer questioned what in fact Burroughs was attempting to sell (RT 1047) and insisted on inspecting these contracts; none, however, were produced by Burroughs, with the meaningless exception of a *blank* contract. (RT 253; 1023, 1018-1019).

On March 20, 1970, Browne submitted an offer to Computerminal. (PX 7; DX GY; RT 570-71; 1032-33). Palmer, dissatisfied with Burroughs' refusal to produce the contracts they claimed to possess so as to afford him an opportunity to ascertain whether the customers had agreed to an assignment or whether he could simply compete for them, submitted a counter-offer on or about March 22, 1970, (PX 20; DX HA; RT 1038) subject to verification of the purported contracts and ratification by the client involved. (RT 577-79). Palmer's offer was declined by Burroughs.

Palmer's caution in insisting on the verification of the batch contracts was well founded. Burroughs' duplicity in

this regard was revealed during trial by Browne in response to questions by the Court:

"The Court: You mean he could take your work (sic) but if he didn't want to take your word he would have to look at it, wouldn't he?

The Witness: No, sir, he could have had the contract or he could have checked it with the customer. He had two sources of checking it."

* * *

"[The Court]: How could he find out, from the customer, whether there was a contract in view of the fact that the customer didn't know that Burroughs had failed to sign? How could he find that out from the customer?

The Witness: Well, I was suggesting, sir, that he would ask the customers, 'Are you having your work processed by Burroughs?'

The Court: That isn't the question. How could he find out there was a contract?

The Witness: He couldn't.

The Court: All right. So the only person he could find out from was you or looking at the contract; isn't that right?

The Witness: Yes, sir.

The Court: And you didn't show him the contract, did you?

The Witness: No, sir.

The Court: And you were asking for him to take your word for something you knew wasn't true; isn't that right?

The Witness: No, sir.

The Court: You knew the contract wasn't signed; isn't that right?

The Witness: I knew the contract wasn't signed.

The Court: And you were asking him to take your word for it that the contract was signed; isn't that correct? Yes or no.

The Witness: Yes, I guess we were." (RT 475-77).

Because Burroughs did not have valid contracts to assign, and the fact that the computer programs and documentation of each account were the property of the individual batch account (RT 547, 554), Palmer expressed to Lowe that he could not "see what it is here you folks are trying to sell, or what you expect me to buy." (RT 1047). Nonetheless Burroughs made it clear to Palmer that the sale of its batch operation was an "all or nothing" proposition (RT 564-65; 1014) and that "whoever paid the money was going to get the customers." (RT 568).

In April of 1970 Cubit System, Inc. agreed to pay Burroughs $257,000 in exchange for Burroughs' delivery of its batch customers to Cubit. At the time of the agreement Cubit was not located in San Francisco but was located in Burlingame, California. (PX 10). Sixty-five per cent (65%) of the processing revenue derived by Cubit was performed on behalf of its corporate parent. (PX 6; 20). As a ruse and in order to secure the necessary financing, Cubit "purchased" a "used and fully depreciated Burroughs B-300 computer system." Cubit and Burroughs agreed that the invoice to be submitted to the bank providing the financing "be made up in a manner as to indicate total purchase price of the computer as $257,000." (PX 9). Burroughs willingly participated in this arrangement and the invoice submitted to the bank

did not disclose the "purchase" of the batch customers. (RT 107; 114-15). Browne conceded at trial that the invoice was "inaccurate", (RT 104; 107); that the invoice was a "misrepresentation" of the actual transaction, (RT 109); that the computer which Burroughs and Cubit represented to the bank as having a market value of $257,000, in fact had a book value of "zero" (RT 106-07), and was "fully depreciated". (PX 20).

The agreement between Burroughs and Cubit further provided that in the absence of contractual rights to assign the batch customers to Cubit, individual client approval of this transaction would be solicited by Burroughs and Cubit through joint visits with individual customers. (PX 10). The agreement with Cubit provided for a reduction of the $257,000 payment if "$300,000 of annualized revenue (is) was not delivered to Cubit." (PX 10).

The agreement was executed on April 13, 1970 by Cubit and on April 17, 1970 by Burroughs. Pursuant to the agreement Burroughs had sixty days from that date to secure the permission and consent of the customers to transfer their processing to Cubit.

Threats, coercion, intimidation and misrepresentation were all used to insure the delivery of the customers to Cubit. They began with the joint visits and escalated into the outright threat of cancellation of the customer's processing to, as Browne said, "motivate most of the clients to sign Exhibit 'C' in favor of Cubit without further delay." (PX 14).

If the purpose of the joint visits was not a matter of common sense, Jim Lowe of Burroughs testified to the obvious:

> "Q. All right. Now, isn't it true at or about this time that what Cubit in effect was doing was going to pay Burroughs—they were going to spend their money paying Burroughs to get the customers rather than spending it on their own sales force to go out and get the customers or compete for them?
>
> A. I believe that's an accurate conclusion, yes." (RT 587).

Throughout the course of the third trial Burroughs' representatives were obviously unwilling to say what Burroughs really "sold" to Cubit. First, it was undisputed that prior to the completion of the Cubit transaction, Burroughs had not executed contracts with their batch accounts. Secondly, and notwithstanding Burroughs' representations that it was selling the documentation and programs for each batch account, (RT 555), James Lowe testified that the customer owned the documentation and programs. (RT 547; 554). Burroughs' inept inability to articulate the substance of its sale was demonstrated at trial:

> "Q. Is it your testimony, sir, that the Burroughs contract that you sought to transfer to Cubit was the Univac contracts and not the contracts that these customers signed in January? Is that your testimony?
>
> A. No, we assumed the Univac contracts, so they were now the contracts which we had assumed, and the connotation that they were the Univac contracts, I am not sure that I understand that, but I am talking about the contracts we assumed from Univac; those

are the contracts which I felt in my mind we were transferring to Cubit.

The Court: Now, Mr. Brown, did you discuss with Cubit the rate at which the services were to be performed for the customer?

The Witness: I'm sure we did.

The Court: And was the rate to which you referred the rate in the Univac contract?

The Witness: No, sir.

The Court: So you weren't transferring Univac contracts, were you?

The Witness: I don't really know, Your Honor.

The Court: Well, now, answer the question in the light of the previous question I put to you.

The Witness: It would seek like we were transferring the contract that Burroughs executed with these customers in about January of 1970.

The Court: But Burroughs didn't execute anything in January of 1970, did it?

The Witness: I guess I should have said again the contracts which customers signed in January of 1970.

The Court: And which were not signed by Burroughs in January, 1970; is that correct?

The Witness: Yes, sir.

The Court: So you really repudiate the testimony you have been giving up to now, don't you?

The Witness: It would seem it's in conflict." (RT 275-76).

Embarking upon their joint visits, Burroughs and Cubit decided to initially approach the larger batch accounts. (PX 20; RT 589-90). During these first visits, three representatives from Burroughs and two representatives from

Cubit were in attendance. (RT 590). Every one of the large accounts was upset upon being informed of Burroughs' decision to abandon the batch business and its attempt to transfer their processing to Cubit. (RT 618). After one visit, all of the larger accounts refused to give their consent during these first visits and subsequent joint visits were necessitated. (RT 618-19).

Burroughs and Cubit then jointly visited these recalcitrant accounts a second time. During these second joint visits and pursuant to a pre-conceived approach, Burroughs advised the customers, among other things, that "most of the key personnel at the data center would be transferring to Cubit." (RT 593; PX 20).

This latter representation was false as conceded by Lowe during trial:

"Q. Well, at that time the key employees at the Burroughs Center in San Francisco were yourself, Mr. Charlton and Mr. Bohannon, isn't that so?

A. Well, we were in management and sales, so I guess we would be termed key; but there were other key employees.

Q. But you three were the highest in that center, were you not?

A. Yes.

Q. It is true, is it not, that none of you went to Cubit?

A. That's correct.

Q. And none of you intended to go to Cubit?

A. That's correct." (RT 594).

In addition, Burroughs made these representations to the batch customers knowing full well that there would be an

erosion of personnel due to the transfer of the data center operation from San Francisco to Cubit's location in Burlingame.

Throughout the course of these visits, and subsequent visits as well as telephone calls to the batch customers, Burroughs never disclosed to these customers that Cubit had paid a quarter of a million dollars to Burroughs for their sponsorship (RT 620-21) and that Burroughs had a financial interest in the transfer of the account's processing to Cubit, or that Burroughs believed Computerminal to be the best data center to process their work.

In addition, Burroughs conceded that its presence with Cubit on these joint visits lent credibility to Cubit who no one had heard of, including Browne. Browne testified:

> "Q. You admit, will you not, sir, that you believe that Cubit had a substantial advantage by having you, the supplier of both Cubit and Computerminal, by having you go and accompany them to each of these customers; didn't you?
>
> A. Yes, I think that would be an advantage." (RT 278).
>
> * * *
>
> "Q. And do you believe that your presence there with Cubit indicated to the customers that you were there in support of Cubit?
>
> A. I would think so, yes." (RT 292).

Due to its initial inability to transfer the customers, Burroughs accelerated the pressure on the customers notwithstanding Browne's earlier statement that he "was not concerned about our ability to obtain transfer agreements

from the customers . . . because the customers really do not have any satisfactory alternative at this time." (PX 7).

The next course of action by Burroughs was to notify the remaining recalcitrant customers that in the absence of their acquiescence to go to Cubit within ten days, Burroughs would terminate their batch processing.

In a memorandum to Lowe from Browne dated May 1, 1970, Browne states:

> "In line with our conversation this afternoon I am attaching a draft of the letter, which I suggested you deliver personally to each of the batch processing clients who have not yet signed Exhibit 'C'.
>
> "This letter gives the client formal notification that Burroughs' contractual liability to process their work ends as of June 30, 1970. This should motivate most of the clients to sign Exhibit 'C' in favor of Cubit without further delay." (PX 14).

The draft of the letter referred to in the foregoing memorandum states in pertinent part:

> "Gentlemen:
>
> ". . . Before announcing our intent to discontinue batch processing in our San Francisco Data Center, we located a Data Center, who in our opinion, is thoroughly reliable, experienced and financially sound to assume the responsibility for processing the batch work for our existing customers."[4]

---

[4]Burroughs made this representation without mentioning that Cubit had paid $275,000 for these accounts (RT 620-21); that Burroughs personnel, specifically Browne and Lowe felt that Computerminal was the "most logical candidate to process these accounts" (RT 221; PX 4) given Computerminal's experience, location, technical capability and location (RT 773-74); and that Cubit was not "in as favorable a position to take on this business as Computerminal." (PX 7).

"The Batch Processing Contract previously presented to you to formalize a new relationship between your firm and Burroughs would have replaced the prior agreement between the Center and your firm when the Center was operated by R&S (Univac). The replacement agreement will be returned to you *provided* Burroughs receives the returned and duly executed Exhibit C transferring said agreement to Cubit Systems Corporation by May 15, 1970. In the absence of this agreement to substitute Cubit Systems Corporation as the performing party, Burroughs must deem its arrangement for processing to be terminated and null and void after June 30, 1970." (*Ibid.*)

This letter which informed the batch accounts that unless they executed the consent to substitution form by May 15, 1970, Burroughs would simply deem its commitment to process their accounts *null and void* after June 30, 1970, was sent to each account on May 4th or 5th. (RT 285). Accordingly, the batch customer had ten days to consider his alternatives. The effect of an abrupt termination of a company's batch processing was attested to by Michael Stumpf, a marketing representative for Computerminal with substantial experience in the batch processing business (RT 490):

"Q. Now, in your opinion, in your experience, if you gave a person, a customer, if you advised them that you were going to cut off their work, stop their work, and you gave them a week in which to make a decision to do something about it, would you, in your opinion, consider that to be applying pressure to that customer?"

* * *

"The Witness: A week could be destructive, yeah.
Mr. Gillam: Could I have the answer read back?
The Court: 'A week would be destructive.'
Mr. Gillam: Thank you." (RT 531-32).

Lowe's efforts during trial to lend a different interpretation to the clear import of the letter sent to the customers were unavailing given the literal meaning of the letter itself. (RT 754).

The ability to use the threat of cancellation was the basic reason Burroughs did not sign the "contracts" with their customers. Under the contracts, the earliest that Burroughs could notify the customers of an intention to terminate services was "at least 90 days *prior* to the expiration of such one year period," (PX 2)—or, October of 1970, as Browne testified.

"Q. And you understood, under this agreement, that you could not terminate your arrangement with a customer until ninety days before the end of the first year; correct?

A. Yes.

Q. And this was accepted by this customer January 12, 1970, so ninety days before January 12, 1971, would be November—sometime in October, correct; correct?

A. Yes, yes." (RT 127)

* * *

"Q. Now, the contracts themselves that these customers signed, first of all, it was your belief that you had to accept them within thirty days for them to be valid.

We already went over that.

A. Yes, that's my opinion.

Q. And you also understood it was your belief that if you accepted them the only way you could terminate them was ninety days before the end of the year, right?

A. Yes.

* * *

Q. First, I am putting on the board January '70 then a dash January '71, the usual term of the contract was for a year, right?

A. That's right.

Q. Okay.

And you could terminate this contract with the customers if you gave them notice ninety days before the end of the year, pointing to January of '71, right?

A. That's correct.

And if you didn't, the contract was automatically renewed for another year.

Q. Okay.

So that means that you had to, if you wanted to terminate it, you had to tell them *October,* early October or late September, I am putting that ninety days, which would be—I am drawing a line and putting October or September of '70.

I put that on the board, too.

So if you wanted to terminate that contract you had to advise them in October or September of 1970, right, and then—isn't that correct?

A. Yes.

Q. And then that would give them time to change data centers, right?

A. Yes." (RT 230-32).

Thus, Browne was forced to admit that one of the reasons Burroughs did not sign the contracts was so that

Burroughs would not be "bound" by the termination requirements:

"Mr. Alioto: Q. Was it not your belief, Mr. Brown, that if you—in fact, if Burroughs signed those contracts with those customers they could not tell the customers—Burroughs could not tell the customers that as of June 30th Burroughs was finished?

A. Mr. Alioto, I didn't really know precisely—

The Court: Now please don't argue with him. The question is if Burroughs had signed the contract, that may be a conditioned contract, but if they had signed the contract, then could Burroughs have terminated the arrangement as of June, 1970?

Mr. Alioto: '70.

The Witness: And the answer to that question, sir, is very simple, and the answer is no.

* * *

Q. And that's why Burroughs didn't sign the contracts, right?

A. That was one of the reasons." (RT 235-36).

Burroughs learned in mid-1970 that Computerminal was competing for the business of these same customers. Palmer testified that Computerminal had previously operated under the assumption that the batch customers were contractually bound to Burroughs and had therefore refrained from competing for these accounts. (RT 990-91). However, upon learning of the joint visits by Burroughs and Cubit, Palmer correctly surmised that the joint visits signified Burroughs' intentions to resign the accounts, that the accounts were now "the subject of free and open competition" and he retracted his previous instructions to his sales force and "now instructed my people that they were to compete." (RT 1060).

In a memorandum dated April 16, 1970, Browne made plain Burroughs' past and present intent toward Computerminal:

> "It has now come back to me through the grape vine that Len Palmer has launched an all out campaign to pick up the choice batch accounts before we can effect transfer of these contracts to Cubit Systems Corporation. I would recommend that you and/or Irv get in touch with Palmer and indicate to him the following:
>
> • • •
>
> "3. Attempts by he and his organization to pick up the contracts we have with the batch customers while we are negotiating transfer of these contracts to Cubit Systems Corporation will be viewed by us with great concern and will cause us to take a dim view of our future relations including the B5500 deal." (PX 11).

At the close of this same memorandum, Browne states:

> "If we do not take a firm stand with Palmer at this time, it is my opinion that we may have a serious problem in transferring the majority of these batch contracts to Cubit Systems Corporation. A major shrinkage in the transfer of these batch processing accounts to Cubit will result in a substantial reduction in the total purchase price we have negotiated with Cubit for this package deal." (PX 11).

Browne also stated in prior testimony (which was used at trial to impeach him), his reason for recommending "a firm stand with Palmer":

> "Q. Why, in your opinion, did you believe that you had a serious problem in this transfer if Burroughs didn't take a strong or firm stand with Palmer?

> A. It was my opinion that an all out campaign to knock off these batch accounts by Computerminal would create a serious problem for us in transferring the majority of the accounts to Cubit.
>
> Did you give that answer?
>
> A. Yes.
>
> Q. To that question, so that is one of the reasons why you didn't tell or advise Computerminal that you, Burroughs, was going out in the field to make these visits with Cubit, correct?
>
> A. That's one of the reasons." (RT 296).

Further, Browne admitted that he was of the view that if Computerminal began to compete against Cubit, it would create

> "fear and distrust in the minds of these customers in terms of Cubit's ability to handle their batch processing work satisfactorily." (RT 297).

Concerned with the possible impairment of its deal with Cubit, Burroughs augmented its pressure on the batch accounts. Following the letter which imposed a ten day ultimatum, Burroughs visited the customers a third time. (RT 332). However, unlike the earlier joint visits, Browne was personally in attendance during these visits. (RT 332). The purpose for having Browne in attendance during these meetings was to convey to the customers that "a high executive of Burroughs" had flown to San Francisco from Burroughs' headquarters in Detroit to personally meet with the customers. (RT 604). The major accounts were still doubtful of Cubit's ability to process their work and greatly agitated by Burroughs' abrupt termination of their batch process operation. (PX 20; RT 598; 618). Burroughs sought to convince them otherwise (RT 358;

598) even though—as Burroughs admitted—the batch accounts "probably" did not know "who Cubit was at this time." (RT 588).

Indeed, Lowe flatly stated that Cubit was the *most* capable data center in the Bay Area. (RT 804; 824). This particular representation as well as Burroughs' other remarks were contrary to what Burroughs otherwise knew and believed.

Browne himself testified with respect to the comparative strengths of Cubit or Computerminal:

> "So that in terms of comparing Computerminal and Cubit as of this time, you believed that Computerminal had better physical facilities, it had a better location and it had better personnel and organization, is that right?
>
> A. Yes.
>
> Q. All right.
>
> Now, in terms of which—to which of those two people your customers would go, was it not your opinion at that time that the best interests of your customers would be served if they went to Computerminal?
>
> A. Yes.
>
> At that moment in time we felt Computerminal was probably in a better position to process the work." (RT 259).

Lowe testified:

> "Mr. Alioto: Q. Well, this morning we went over where you today admitted that you stated, at least to one customer, that you believed Computerminal—I mean, that Cubit was the most capable, correct?
>
> A. Correct.

> Q. And that was during the time, after you testified yesterday, that you believed at all times Computerminal was the best?
>
> A. Yes." (RT 825-26).

Plaintiff's Exhibit 7, an interoffice memorandum from Browne to Bailey dated March 23, 1970 states in regard to Cubit:

> "While the other prospect (i.e., Cubit) is most interested in this business, I do not feel that they are in as favorable a position to take on this business as Computerminal. They would have a more difficult job in getting all of the customers to accept their offer to process the batch work." (See also RT 565).

During the course of these visits whenever the customer questioned Burroughs' representatives as to the operational capability and/or financial viability of Computerminal (a reasonable question in light of Burrough' position as a supplier of Computerminal), the Burroughs' representatives would either change the subject or simply greet the inquiry with silence. (PX 20; RT 618-19). In addition, Burroughs' representatives did not state their view that Computerminal was the most experienced and equipped data center and "the most logical candidate for their business." (RT 12-13; 289-292; PX 20).

The ten day deadline imposed by Burroughs' letter for the customers to consent to the substitution of Cubit expired on May 15, 1970. (PX 15, 17). Lowe testified that the large accounts necessitated three to four visits plus the termination letter before Burroughs was able to secure their consent to the substitution of Cubit. (RT 691). In

addition, Burroughs was in "daily contact by phone with many of these users." (RT 741).

Jenkel Davidson, one of the large accounts "was shocked" that Burroughs was abandoning its batch processing accounts." (PX 20). Burroughs over the course of three joint visits informed Jenkel Davidson that Burroughs "had put a lot of careful thought into the decision and had looked around for a company capable of doing good business, with financial stability." (PX 20; RT 596). Burroughs did not disclose to this client the fact that Cubit had paid money to process this account or that Burroughs had promised to deliver the account upon the payment of an acceptable price. (RT 620-21; 568). Lowe testified that Jenkel Davidson required three visits, including one visit which Browne had flown in from Detroit to attend. (RT 603-04). Faced with the prospect of an immediate and complete termination of its batch processing, Jenkel Davidson signed the consent to substitute Cubit three days before the May 15th deadline imposed by Burroughs' threat of cancellation letter. (RT 603-04).

John F. Forbes' reaction to Burroughs' decision "was very adverse." (PX 20). They were upset that Burroughs had recently raised its price and were even more upset that the additional work Burroughs had promised at the time the price was raised had not been done. (PX 20; RT 605). This account required three visits including one in which Browne was present. (RT 605-07). Three days prior to the May 15th deadline, they consented to the transfer. (RT 606-07). A representative of John F. Forbes

testified that Burroughs "threatened to terminate their services" (RT 732) and the threat of an immediate cancellation of its batch processing was cause for concern because Forbes would not be able to "fill our clients without it, and we would eventually run out of money to pay our payroll." (RT 732). When Forbes representatives questioned the legal ability of Burroughs to terminate its processing services in light of the notice requirements contained in the "new contracts", Lowe informed them that Burroughs was not bound by these unexecuted contracts. (RT 730-32). A Forbes representative also stated that the joint visit of Cubit and Burroughs indicated that if Forbes "didn't go to Cubit" its batch processing would be "interrupted". (RT 735).[5]

Norris, Beggs & Simpson also informed Burroughs of their displeasure in response to Burroughs' notification of its intention to abandon the batch processing business. (RT 609; PX 20). When Norris, Beggs & Simpson during a third visit by Burroughs representatives raised a question as to Computerminal's financial condition, Browne and Lowe who were in attendance, "said nothing" in response

[5]In the first trial of this action, John C. Bria, data processing manager of Crocker McAllister Leasing, Inc., another of the large batch customers, stated that his company was "upset" at "the surprise of suddenly somebody dropping out of the business and leaving us with unknown alternatives" . . . that "we hadn't at that time had a sufficient opportunity to examine." (RT 952, March 4, 1974). Bria understood the harsh business realities of a situation in which the only recourse Crocker had if Burroughs chose to terminate its services was legal action based on its contract with Burroughs which would be meaningless given the fact that "during that time McAllister would go down the tubes because we didn't have any data processing capability and our whole company was set up with the requirement these runs come from the computer ever (sic) month" and this constituted "pressure". (RT 960, March 4, 1974).

(RT 611-613) even though both were of the view that Computerminal was "financially able." (RT 613).[6] Sometime after receipt of Burroughs' cancellation letter and subsequent to a third visit on May 12, 1970, Norris, Beggs & Simpson executed the consent to substitute Cubit. (RT 613-14).

The Consent to Substitution forms submitted to the batch customers referred to the assignment of a purported contract executed between Burroughs and the customer. (DX GS). Accordingly, Burroughs had made a misrepresentation "in the very consents to substitution signed by each customer in light of Burroughs' failure to execute the contracts until after the transfer of all the [B]atch [P]rocessing customers." (RT 813; PX 19).

Immediately after the joint visits by Burroughs and Cubit, Computerminal was unable to secure additional batch accounts, and even its own customers began to question Computerminal's financial viability. (RT 490-93). Michael Stumpf, Computerminal marketing representative testified with respect to the business difficulties encountered by Computerminal after the Burroughs-Cubit joint visits:

> "Q. After the joint visits between Burroughs and Cubit in the marketplace, did you observe any situation in the marketplace which was different from your past experiences?
>
> A. I think the only place I can specifically say I observed it—you know, I felt it—that was in the people they had called on together.

[6]Browne specifically attended this meeting with Norris, Beggs & Simpson because he was aware that Burroughs may "lose (this account' to Computerminal" and he sought to "convince them not to go to Computerminal." (RT 356-63).

> Q. What was it that you observed or felt?
>
> A. On the people they had called on together, it was a pretty cold situation. I don't think they were responding like businessmen would. There was a lot of guns. That's the people they called on specifically.
>
> "The rest of it, the lack of success of us as an organization and me personally, is a little more complicated. There was a coldness in the marketplace, yes. I don't know what that means, but we weren't getting anywhere.
>
> Q. Now, had you experienced such a situation ever before in your 11 years experience in this kind of business?
>
> A. I could honestly say no." (RT 490).

Stumpf further testified that subsequent to these visits, the customers sensed "the arrestment of our growth" (RT 492), and that "things at Computerminal begin to go downhill." (RT 533).

The inability to obtain new accounts was also unique to Leonard Palmer. Palmer testified that his past experience with previous companies as well as Computerminal in soliciting new business prior to the implementation of "Plan X" and the joint visits had been "quite positive". (RT 1073). Subsequent to the joint visits by Burroughs and Cubit, Palmer testified that "we never got one single account of any material significance" and his "experience in that regard was unique." (RT 1073-74; 1180).

Palmer also stated that subsequent to the joint visits in May of 1970, Computerminal's own customers began to question its financial stability (RT 1184); that such inquiries became frequent in occurrence (RT 1081); that

such inquiries had never occurred prior to the joint visits by Burroughs and Cubit (RT 1183-84); and that such inquiries were "unique" (RT 1708-09).

In a corporate report to Computerminal's shareholders dated June 26, 1970, the report notes:

> "Several of the accounts that were projected to start in the period July-August have declined proposals, e.g., Norris, Beggs and Simpson, and Forbes and Company. The major reason given was concern regarding the future of CompuTerminal." (PX 24).

Prior to the joint visits by Cubit and Burroughs, Palmer had never been questioned as to the financial stability of his company (RT 1081), but subsequent to said visits, such inquiries became frequent in occurrence. (RT 1887). The seeds of uncertainty planted by Burroughs with respect to the Computerminal's viability spread quickly throughout the business community. It was not unusual given the nature of the batch processing business for industry information or gossip to be widely disseminated within a short period of time. Browne testified that the industry "grapevine is pretty active" (RT 222); that he believed the fact of Burroughs and Cubit's joint visits would get "out into the trade" given the nature and existence of this "grapevine" (RT 279-80); that the fact of these joint visits "would get back to Computerminal through the trade" specifically from customers. (RT 294).

The impact upon a young company such as Computerminal in being precluded from competing for these accounts was not lost upon Burroughs. Indeed during trial, Browne testified to the importance of additional revenue to a young company like Computerminal:

> "Mr. Alioto: Q. And you knew that as a young company additional revenue, meaning customers, was important to Computerminal?
>
> A. Yes. I would assume so.
>
> Q. Well, you knew so, didn't you?
>
> A. Yes.
>
> Q. All right.
>
> As it applied to Computerminal?
>
> A. Yes.
>
> Q. Okay.
>
> And didn't you also know that if you took steps to prevent Computerminal from competing on the merits for that additional revenue that it would injure Computerminal in its formative stages of just beginning?
>
> A. Yes. . . ." RT 197-98).

* * *

> "Mr. Alioto: Q. My question is, did you not believe Mr. Brown, that Computerminal needed the additional revenue to cover their start-up expenses to get their business going?
>
> A. Yes. I believed that.
>
> Q. You believed that. All right. And believing that, you, nonetheless, made this visit to Norris Beggs in order to convince Norris Beggs not to go to Computerminal, correct?
>
> A. Yes." (RT 360).

Lowe also recognized the importance of this revenue to Computerminal and during his unsuccessful efforts to induce Palmer to pay for Burroughs' sponsorship, Lowe continuously "presented the batch business of Burroughs Corporation as being that segment of business which would get us (i.e., Computerminal) over the hill." (RT 1242).

In July of 1971, due to the worsening financial condition precipitated by Burroughs' efforts to prevent Computerminal from competing for the batch accounts, Computerminal, in a corporate reorganization, sold its assets and ongoing business to a successor corporation, Palmer Data Corporation. (RT 1100; 1103; 1105; 1121; DX B).

"One of the principal reasons why Burroughs was able to effectuate its plan was the uniqueness of the Burroughs users vis-a-vis the customers. In effect, the customers were locked into Burroughs users and could not inexpensively, readily and easily transfer their business to batch processors using other equipment."

"Now, this whole idea of these customers, *this was limited,* was it not, *to Burroughs users*? In other words, *data centers using Burroughs*?

Mr. Gillam: Objection. No foundation for that.

The Court: I will allow him to answer the question, if it's true.

The Witness: *I believe it was, yes.*

Mr. Alioto: Q. *Why was that so?*

A. *Because of the compatibility of programs and equipment.*" (RT 815).

And:

"*Is it not true that, as far as you were concerned, the available market of purchasers—*

The Court: Purchaser?

Mr. Alioto: Purchasers of—'purchasers' *of the customers, the customers in San Francisco, Burroughs' batch center, were just those centers who used Burroughs' equipment?*

Mr. Gillam: Your honor, might I ask counsel to rephrase it to use a word other than 'market.' The

question is to whom Burroughs went to try and sell its customers is one thing, but to say to people to whom they meant, I think it inappropriate.

The Court: *Well, an economically distinguishable branch of business.*

"The Witness: *I only contacted users of Burroughs' equipment.*

Mr. Alioto: Q. *And there was a purpose and reason for doing that?*

A. *Because of the compatibility of equipment.*" (RT. 817-818).

"And whereas it was necessary to reprogram when moving from one make of machine to another, this was not so when moving from one Burroughs machine to another";

"A. If you mean by that, sir, the programs that were running on the B-300's?

Q. Yes.

A. Could they run on the B-2500 that Computerminal had?

Q. Yes. *Would they have to be reprogrammed?*

A. *Not necessarily. They could be run by the use of a translator or an immulator, which we would provide.*" (RT 837, 838).

Palmer testified as follows:

"Now, *if you can simulate,* which is to say, the problem definition remains the same, the systems design remains the same, all you want to do is interpret an instruction from one computer speaking French to another computer speaking English, now you simply simulate that and—assuming all representations are correct, *you have no reprogramming expense, or minimum reprogramming expense.*" (RT. 1287, 1288).

In addition, there was no "interchange" of simulators. Palmer testified as follows:

"Mr. Alioto: Q. Now, would the Burroughs Corporation, for example, have a deck of cards that would make a Burroughs machine act like an IBM machine, or vice versa?

Would IBM have a deck of cards that would make an IBM machine act like a Burroughs machine?

A. I understand. There was some work being done in that area. I don't know what the current status of it is.

The Court: We were asking about 1969-1971.

Mr. Alioto: 1969, '70, '71. Do you know of any existence of that, for example, if a customer were being processed by a data center using IBM—

A. Yes.

Q. —if that customer wanted to come over to Computerminal, which used Burroughs equipment—

A. Yes, sir.

Q. —did Burroughs have a deck of cards that you could put into your B-2500 to make the B-2500 act like an IBM machine?

A. Yes. [sic] *The answer is they did not.*" (RT 1300, 1301).

And, not only was there no "interchange" of simulators, but also in order to move *from* a Burroughs computer to *another make* of computer one would have to redocument and redesign *as well as* reprogram. Palmer testified as follows:

"[The Court]: Is there any *difficulty* in the customer *going from a center that has IBM equipment to,* say, *a center that has Burroughs equipment?*

The Witness: *Yes, there is.*

Mr. Alioto. Q. What is it?

"A. *If a customer is already using Burroughs, he would have the whole reprogramming, redocumentation and redefinition.*" (RT. 1280, 1281).

"The Court: Under those circumstances *I take it for granted that people do not change* ordinarily on an annual basis *from one data center to another?*

"The Witness: *Nor from one computer to another internally, and the specified phrase in the industry is 'locked in.'*" (RT. 1282, 1283).

* * *

"If you have to do the whole thing over, you have the maximum reprogramming expense. If you have to do simply the recoding over, you have a much lesser reprogramming expense.

"Now, *if you can simulate*, which is to say, the problem definition remains the same, the systems design remains the same, all you want to do is interpret an instruction from one computer speaking French to another computer speaking English, now you simply simulate that and—assuming all representations are correct, *you have no reprogramming expense, or minimum reprogramming expense.*" (RT. 1287, 1288).

"As a consequence of this uniqueness, the petitioner's officer specifically took this factor into account when exploring the potential of the market":

"The Court: . . . Did you look around as to the business possibilities?

The Witness: Yes.

And *with two views,* Your Honor. That's what I wanted to express clearly. When you look at a move into an area there are *two ways* to look at it. *One is that there is a business opportunity which is already*

established and may become available to you; and another is the view that you have to create the opportunity.

What I am trying to say is that *there would be a big difference if there were no customers anywhere in the area utilizing a data center equipped with a Burroughs computer,* although there might be many customers utilizing data centers with other kinds of equipment. *That would be one situation.*

Another situation is where a large number of customers or a number of customers exist which are utilizing the services of a data center equipped with Burroughs equipment and which, for some reason or other, you feel will probably be available to you. Those are two different situations, and *they go directly to how you proceed,* which is why I am stressing this point. I am sorry, *it goes directly to how one proceeds."* (RT 925, 926).

And:

"Mr. Alioto: Q. Prior to the time that you set up Computerminal in San Francisco, you came to San Francisco, did you not, and investigated the market?

A. Yes.

Q. And in that investigation, what were the kinds of things that you were looking for?

* * *

The Witness: *I was looking for the size in terms or revenue of the two areas of the market I have testified to earlier; one, that section of the market which would be clients using data processing services on Burroughs' equipment and data center which, at that time, was Univac,* and secondly, the general climate of the market with respect to new accounts.

That is to say, clients either using data center services or not using them, but on other equipment or no equipment other than Burroughs.

Q. What did you physically do? I mean how does one go and investigate a market?

A. Yes.

The Court: What kinds of people did you talk to?

The Witness: I spoke with all of the folks at the Univac center that I had known before. *I generally ascertained the level of business that was being done with respect to clients' utilizing Burroughs equipment in a data center."* (RT 1056, 1066).

* * *

"Mr. Alioto: Q. Then how did you make your evaluation of what the market would yield to Computerminal starting up?

A. What opportunity it would yield?

Q. Yes.

A. Yes. If Univac was on the verge, or close to resigning, *those batch processing accounts utilizing Burroughs' equipment,* which I must say seemed very logical to me, *then we had a base of business, and an opportunity to compete for a base of business that was already utilizing Burroughs' equipment and that was a significant consideration in my opinion."* (RT 1065-1067).

Finally, the fact that customers would become economically "locked in" was a principal reason why Burroughs was able to execute Plan X. First, Browne initially noted in an interoffice memorandum when he was attempting to "sell" the customers to the plaintiff that "the *customers*

really do not have *any* satisfactory *alternative.*" (PX 8). And the plethora of evidence on the merits of the case, as noted in the plaintiff-appellant's brief, demonstrates the efforts to restrain the plaintiff from competing and coerce the customers, without the slightest concern of other processors using equipment other than Burroughs equipment.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ are as follows:

1. The decision below is contrary to the letter and spirit of the Seventh Amendment to the Constitution;

2. The decision below is contrary to the letter and spirit of this Court's decisions in *Beacon Theatres v. Westover*, 359 U.S. 500 (1959) and *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29 (1944);

3. The decision below is the ultimate threat to the public policy favoring the private enforcement of the antitrust laws;

4. The decision below eradicates any deterrent effect which the antitrust laws and trials by jury may have otherwise had—indeed, the decision below is but a dramatic example of the extraordinary and alarming number of antitrust jury verdicts which have been vacated in the last decade; and

5. The decision below substantially contributes to the crowding of the courts by ensuring and guaranteeing to antitrust defendants that they need not be concerned

about going to trial or about any possible finality otherwise associated with jury verdicts.

In *Beacon Theatres, supra,* this Court explicitly stated that the jury in antitrust cases was "an *essential* part of the congressional plan for making competition rather than monopoly the rule of trade." Yet, over the past decade, so many cases have vacated jury verdicts and either granted judgment NOV or new trials that no putative antitrust violator could possibly believe that it would or could ever be held accountable. *See:*

Wen Mar Enterpises, Inc. v. Alexander Motor Co., et al. (9th Cir. 1969) 416 F.2d 15; *Household Goods Carriers' Bureau v. John Terrell, et al.* (5th Cir. 1969) 417 F.2d 47; *Harrison v. Prather,* (5th Cir. 1970) 435 F.2d 1168; *Household Goods Carriers' Bureau v. Terrell* (5th Cir. 1971) 452 F.2d 152; *Belliston v. Texaco* (10th Cir. 1972) 455 F.2d 175; *Siegel v. Chicken Delight, Inc.* (9th Cir. 1971) 448 F.2d 43; *Herold Co. v. Albrecht,* 452 F.2d 124 (1971); *Elder-Beerman Stores Corp. v. Federated Dept. Stores,* (6th Cir. 1972) 459 F.2d 138; *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee,* (5th Cir. 1972) 467 F.2d 178; *Weather Wise Company v. Aeroquip,* (5th Cir. 1972) 468 F.2d 716; *Ag-Chem Equipment Co., Inc. v. Hahn, Inc.* (8th Cir. 1973) 480 F.2d 482; *Audrey D. Hanson d/b/a Hanson Paint and Glass v. Pittsburg Plate Glass Industries, Inc.* (5th Cir. 1973) 482 F.2d 220; *Hallmark Industry v. Reynolds Metal Co.* (9th Cir. 1973) 489 F.2d 8; *Scott Medical Supply Co. v. Bedsole Surgical Supplies, Inc.* (5th Cir. 1974) 488 F.2d 934; *John M. England*

v. Chrysler Corp. (9th Cir. 1974) 493 F.2d 269; *Ford Wholesale Co., Inc. v. Fibreboard Paper Products Corp.* (9th Cir. 1974) 493 F.2d 1204; *Champion Oil Service Co. v. Sinclair Refining Co.* (6th Cir. 1974) 502 F.2d 709; *Venzie Corp. v. U.S. Mineral Product Co., Inc.* (3rd Cir. 1975) 521 F.2d 1309; *Kestenbaum v. Falstaff*, (5th Cir. 1975) 514 F.2d 690; *Defilippo v. Ford Motor Co.* (3rd Cir. 1975) 516 F.2d 1313; *Davis v. Marathon Oil Co.* (6th Cir. 1975) 528 F.2d 395; *Carlyle Michelman v. Clark Schwebel Fiber Glass Corp.* (2d Cir. 1976) 534 F.2d 1036; *Pitchford v. Pepi, Inc.* (3d Cir. 1976) 531 F.2d 92; *Spectrofuge Corp. v. Beckman Instruments, Inc.* (5th Cir. 1978) 575 F.2d 256; *Sitkin Smelting & Refining Co., Inc. FMC Corp.* (3rd Cir. 1977) 575 F.2d 440; *GTE Sylvannia, Inc. v. Continental,* 537 F.2d 980; *Oreck v. Whirlpool Corp.* 563 F.2d 54 (1977); *Martin B. Glauser Dodge Co. v. Chrysler Corp.* (3rd Cir. 1977) 570 F.2d 72; *Dougherty v. Continental Oil Co.*, (5th Cir. 1978) 579 F.2d 954; *Gough v. Rossmoor Corp.* (9th Cir. 1978) 585 F.2d 381; *Hoys v. Solomon* (5th Cir. 1979) 597 F.2d 958; *Stuart M. Kaplan v. Burroughs Corp.* (9th Cir. 1979) 611 F.2d 286; *Engine Specialties v. Bombadier Limileil* (1st Cir. 1979); *Refrigerated Food Line, Inc. v. Republic Industries, Inc.* (8th Cir. 1979) 605 F.2d 412; *Berkey Photo, Inc. v. Eastman Kodak* (2d Cir. 1979) 603 F.2d 263; *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.* (2d Cir. 1979) 602 F.2d 1025; *Magnus Petroleum Co., Inc. v. Shelly Oil Co.* (7th Cir. 1979) 599 F.2d 196; *REA v. Ford Motor Co.* (3rd Cir. 1974) 497 F.2d 577; *Hawaiian Oke v. Seagram* (9th Cir. 1969) 416 F.2d 71.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit reversed.

Dated: April 23, 1980

Respectfully submitted,

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(Appendices follow)

Appendices

Appendix A

United States District Court
Northern District of California

C 71-479 SAW

Edward Walsh, Trustee in Bankruptcy for Palmer Data Corporation,

vs.

Burroughs Corporation,

[Filed April 28, 1976]

OPINION

WYZANSKI, Senior District Judge.

Defendant has filed motions to set aside the jury's general verdict in favor of plaintiff in the amount of $1,162,000 (before trebling and attorney's fees), and to enter judgment for defendant *non obstante veredicto*.

In connection with these motions, the appropriate course is to view the evidence in every way most favorably to plaintiff.

From that approach, it appears that a jury could reasonably have found the following facts.

Defendant's supervisory employee, Browne, acting within the scope of his authority over batch data com-

puter operations, proposed in 1969 that defendant, a national manufacturer of computers and the operator of a batch data computer center in San Francisco, should abandon its San Francisco operations and salvage from that center the value which inhered in the good will of those who were its customers, by selling the accounts of those customers to some other batch data computer center which operated Burroughs machines.

The outstanding prospective purchaser was Computerminal, Inc., of which Palmer was the president.

Browne and another Burroughs employee, Lowe, approached Palmer with an offer to sell the so-called customers' contracts for $150,000. There were in fact no contracts because the written draft contracts for 1970 had never been executed by Burroughs, and there had not been that mutuality of understanding expressed by the acts of the parties which created what are sometimes called contracts by conduct. Moreover, those arrangements which Burroughs had with its customers did not impliedly nor expressly contemplate that Burroughs could delegate performance of computer service to other centers except with the express consent of the customers. Palmer, therefore, concluded that Burroughs had nothing to sell, and so, after investigation, declined to make the purchase.

Angered by this turndown, Browne intemperately wrote a memorandum to his chief, Bailey, indicating a punitive attitude toward Computerminal. Bailey has left Burroughs and has not been located by either party to this case. We do not know his attitude nor that of any other high Burroughs official.

However, we do know that Browne approached another computer operator, Cubit, Inc., which had never served the general public in the City of San Francisco but had, in its capacity as a subsidiary of Purity Stores, Inc., done computer work in Burlingame, a city in the Bay Area about 20 miles from San Francisco. After discussions, Cubit agreed to pay $150,000 for the Burroughs accounts and for an old model B-300 Burroughs computer. Because Burroughs wanted to keep secret the fact that it was being paid for its customer list, and because Cubit wanted to get a large loan from a bank, Cubit, with Burroughs' connivance borrowed $150,000 from a bank by falsely representing that the proceeds of the loan would be used by Cubit exclusively to buy the B-300 Burroughs computer.

Then Browne and Lowe, as representatives of Burroughs, jointly with representatives of Cubit visited each of the customers of Burroughs and informed them that Burroughs was transferring its computer operating business in the San Francisco area to Cubit, and solicited the customers to use Cubit's center. In this connection, the representatives of Burroughs expressly or impliedly represented that these customers had binding annual contracts with Burroughs, and that Burroughs' delegation of performance to Cubit was permissible under such contracts. Both of those representations were false, and Burroughs' representatives knew (or should have known) at least that the so-called contracts had never been accepted by Burroughs.

Not content with initial visits of explanation to their customers, the Burroughs representatives pursued in

some, but not all, cases customers two, three, or more times, and in a few cases sent letters, until all but two of the customers consented to have their work done by Cubit. At no time did the Burroughs representatives explain to customers that for this transfer Burroughs was being paid, nor that Computerminal had, in its B-2502 Burroughs machine, better equipment than Cubit had, nor that Computerminal was physically closer to customers and in that respect might be a more satisfactory center. One customer, Arnstein of Forbes, indicated that he felt that his company's best interests were not being considered.

Had Burroughs not supported Cubit, it is probable that since Computerminal had in April 1970 the best service to offer to batch data process customers in San Francisco, the former Burroughs customers would in many instances have taken their work to Computerminal. But as a result of Burroughs' visits and follow-up letters including, in a couple of instances in May 1970, a threat from Burroughs to leave the former customers without any service after July 1970, all but two of Burroughs' customers went to Cubit, and of those two one went to Computerminal and the other ceased to have its batch data work done by any Burroughs center.

During the conferences of representatives of Burroughs, representatives of Cubit, and customers of Burroughs, the representatives of Burroughs never expressly commented on Computerminal. Yet the praise of Cubit carried with it an inference that no other center would in Burroughs' view be equally satisfactory in handling the Burroughs' customers' work.

However, despite plaintiff's argument, there is in the evidence no basis for an express nor an implied disparagement of Computerminal as a competent computer center generally. So there was nothing adverse to Computerminal to be carried on a "grapevine" to prospective potential customers of Computerminal who had not previously dealt with it or with Burroughs. Even if, as a Computerminal salesperson, Stumpf, testified, the demand for the services of Computerminal suddenly fell off after April 16, 1970, that drying-up cannot be traced to, and was not caused by, any Section 1 violation by Burroughs.

If there had been no April 16, 1970 contract between Burroughs and Cubit, if it remained in business, Computerminal in 1970 and in each succeeding year through 1975 would have had $275,000 of gross receipts from Burroughs' former customers.

The incremental costs of securing those gross receipts would have been on the view most favorable to plaintiff:

(1) large sums for key-punch machines and operatives;

(2) Some amount for other additional personnel, even if the jury found, as it might have, that Computerminal on April 16, 1970, already had on hand a reasonable excess capacity to take care of new business, on an optimistic prognosis. That is, on April 16, 1970, in the light of reasonable expectations of the gradually increasing business which would be likely to flow to a newly-started business, Computerminal had more floor space than it was currently utilizing, more machine time on the B-2502 than it was currently utilizing, and more personnel than it was currently utilizing. The jury could have found that such stand-by capacity with respect to premises, to

machines, and to personnel was not obviously wasteful, nor economically improper but was just justifiable as a bait for future business and as an immediately available resource in the light of plausible needs in the near future.

(3) Some allowance for "simulation" (that is, the cost incurred in giving additional program instructions to a B-2502 Burroughs computer to enable it to perform work which had been originally performed pursuant to programs designed for a B-300 Burroughs computer); and

(4) Some amount for the temporary rental of a B-300 Burroughs computer.

No matter how those deductions from gross receipts are calculated from Palmer's own testimony, the resulting potential net earnings from the former Burroughs customers could not reasonably be found likely to have a reach of $1,162,000 in the years April 16, 1970 through December 31, 1975.

And, as already noted, there is no causal basis for allowing plaintiff any damages on account of its failure to get wholly new customers never serviced by Burroughs nor by Computerminal.

From the foregoing analysis it follows that the verdict must be set aside on two wholly independent grounds.

First, there was no evidence to show directly, or to support indirectly, an inference, that Burroughs disparaged Computerminal as a center. At most, there could have been an inference that to its own customers Burroughs had indicated that for their special purposes as current contractual customers of Burroughs, with programs already designed and utilized, Computerminal was

not so satisfactory as Cubit. There is no inferential or other basis for the claim that Burroughs disparaged the availability, competence, financial ability, or other qualities of Computerminal generally as a batch data computer center operating in San Francisco with or without a Burroughs machine, or in any aspect whatsoever, except in comparison with Cubit as an outlet for Burroughs' customers. Hence, it was improper to have admitted evidence as to damage with respect to possible receipts from such potential new customers. It was improper to have charged with respect to such an element of damages. [See the full text of the charge, attached hereto as an appendix.] And it is not possible, in the absence of a special verdict and of special questions, to know how much of the $1,162,000 figure in the general verdict is properly attributable to those errors. Quite possibly, in the light of the arguments of counsel, approximately half is so attributable.

Second, independently of the heretofore recited set of errors, the verdict is excessive even if by legerdemain or a *tour de force* it could be hypothetically related solely to damages allegedly caused by the Burroughs interference with Computerminal's getting Burroughs' customers. One difficulty would be that Palmer himself admitted that he never wanted more than five or so of the eighteen or twenty customers, and Computerminal did, despite the alleged interference by Burroughs with the free choice of its customers, get one of those customers, and, moreover, Zusman, without contradiction, testified that his concern felt free to go to Computerminal, and did consider Computerminal on its merits, but preferred Cubit. However,

those are not the main points. The main points are that in Palmer's own testimony there is not evidence to show that Computerminal's net earnings from the supposititious business which it might have had a chance to get from Burroughs' customers and which it might have wanted to handle, would have amounted, after making deductions which Palmer himself ultimately conceded had to be made, to $1,162,000 from April 16, 1970 to December 31, 1975. Such a figure is grossly inflated on plaintiff's own testimony.

It would, of course, be possible to set aside only so much of the verdict as relates to damages and to permit the verdict as to liability to stand.

But experience in two earlier trials in this very case shows that this is a dangerous course. Judge Weigel first set aside so much of a jury verdict of $1,200,000 as involved damages, but, preserving that part of the verdict which related to liability, conducted a second trial on damages. The second jury returned a verdict of no damages. Whereupon Judge Weigel set aside both that second verdict and the remaining part of the first verdict. It is easily foreseeable that Judge Weigel's experience might be repeated were this court now merely to set aside only the part of the verdict relating to damages.

Moreover, it is clear to one who has sat for five weeks as a judge hearing evidence in this case that the facts relating to liability and to damage, as well as to causation, are inextricably interwoven.

Nor would there be any material saving of time nor of expense in such a partial setting aside of a verdict.

Nor does justice demand that plaintiff be allowed to keep so much of its verdict as may relate to liability. While this court has reviewed scrupulously the record to search out what is the most favorable analysis from plaintiff's view of the evidence, the court has not said, and does not now say, that taken as a whole the evidence is sufficient to withstand the defendant's motion to set aside the verdict in every aspect on the ground that it is against the overwhelming weight of the evidence as to liability. However, it is unnecessary for the court to pass on such a contention, inasmuch as the verdict is fatally vulnerable on the issues of causation and damages.

However, out of an abundance of caution, this court adds that it does regard the overwhelming weight of the evidence as indicating *first*, that despite Browne's suggestion that measures be taken against Computerminal, *authorized* officers of Burroughs never had a specific intent to destroy Computerminals batch data business; *second*, that if Burroughs coerced any of its customers, it did not coerce the vast majority of them; *third*, that Burroughs merely sought to salvage something from its San Francisco center; *fourth*, that there was inherent in Burroughs' San Francisco business a goodwill item of substantial value which flowed not from firm contracts but from the warranted expectations of continued patronage, and such an item of good will was recognized by Palmer himself in connection generally with batch data computer centers, for when he came to value Computerminal he testified that there should be included in the value the expectation of business to be received, and he did this although the expectations were with respect to merely

potential customers with whom Computerminal had never had business relations; *fifth*, that Burroughs in its misrepresentations did not have any anti-competitve intent, but merely a greedy intent to get as much as possible from its salvage operations, together with a prudential, if somewhat duplicitous, intent to avoid firm written contracts until it could sell them; and *sixth*, that Computerminal was legally committed to withdraw from the batch data computer business as promptly as possible after the Solomon Brothers and Hutzler deal collapsed, and so under no circumstances could damages be allowed for any period after July 1970. Motion for judgment n.o.v. denied. Motion to set aside verdict granted.

Charles E. Wyzanski, U.S.D.J.
Apr 28, 1976

Appendix to Appendix B

INSTRUCTIONS TO THE JURY

[2862] THE COURT: Good morning, members of the jury.

Ladies and gentlemen, yesterday before counsel argued I gave you some instructions, and I am now going to complete my instructions, and I shall first deal with points of law as to which what I say binds you. Thereafter, and I will make it quite plain when the break occurs, I shall turn **[2863]** from points of law to what seem to me to be analytically the factual problems in the case. When I come to this analytical part, whatever I say you are wholly free to disregard. I shall try to be fair to both parties in the analysis, but when a judge deals with factual questions even by way of analysis or illustration, the jury is not bound by what the judge says.

The only reason that I will engage in this analysis is because this is a case which has lasted five weeks, is in its essence very complicated, and falls within a field where perhaps I have had an experience which is worth laying before you for such appraisal as you see fit. In that analysis, however, I no more bind you than counsel bind you by their arguments. I will make it quite plain when I come to the analysis as distinguished from the instructions which are binding upon you with regard to the law.

You recall that yesterday when I began the instructions to you, I circulated to you the pretrial order in

this case and I read it to you while you had it in your hands. That pretrial order was signed by counsel for plaintiff and counsel for the defendant and by one of the regular judges of the United States District Court for the Northern District of California. I had no more to do with it than you had. But, that is a pretrial order which becomes binding upon you as upon me, as well as upon the parties. Neither you nor I has **[2864]** any right as the pretrial order stands in its unamended form, to go outside the scope of that pretrial order in considering what are the issues in this case. That doesn't mean that we can't subdivide the issues, but we can't bring into the case entirely new issues, new parties or anything which is not fairly within the coverage of the pretrial order.

The parties engaged in their pretrial discovery and in their preparation of this case in the light of the pretrial order. I made my rulings during the case in the light of the pretrial order, and your verdict and my charge should be within the scope of that pretrial order.

Now, I need not remind you, I think, that anything that counsel has said or that I have said or will say about the credibility of witnesses is merely intended to help you and does not control you. You are the persons who are to decide which witnesses to believe, which exhibits to believe, if you believe any of them. You are not required to believe anything, it's entirely up to you. And as I said to you, there is no rule of law which tells you that one kind of testimony in this case is better or worse than another kind. And the standards that you will apply in judging the truthfulness of witnesses are primarily the standards of common sense and ordinary experience.

Now, I have already said to you also that there are, as both sides agree, no problems now of whether interstate **[2865]** commerce is involved in this case. So far as you and I are concerned, the parties have agreed that insofar as interstate commerce is a fact necessary to prove with respect to jurisdiction or with respect to substance, there is an agreement to treat the fact as though it has been adequately proved. Don't bother about interstate commerce at all. From now on forget it.

It's also agreed between the parties, as you can tell from the pretrial order, that there are three main issues in this case. First: Did the Defendant Burroughs Corporation violate Section 1 of the Sherman Act by engaging in a combination, conspiracy or contract in restraint of trade, as that term is used in the statute called the Sherman Act, an act passed in 1890.

The second issue is whether if there were such a violation, was that violation the proximate cause, was it a substantial cause, not necessarily the only cause, of injury to the plaintiff. And the plaintiff in this case is the trustee in bankruptcy Walsh, successor by operation of law to Palmer Data Corporation, which, in turn, acquired any claim that Computerminal Corporation had with respect to antitrust or any other dispute.

You will not have to bother at all with the fact that the plaintiff's name is Walsh. You and I aren't the slightest concerned with how he got this claim, but the claim **[2866]** that he makes is in essence a claim which originally was Computerminal's and which passed by assignment through an intermediate step to Walsh.

The third issue in this case is whether if there was a violation of Section 1 of the Sherman Act by Burroughs Corporation, and if that violation was a substantial cause of injury to Computerminal Corporation, what are the recoverable damages. On each one of those three issues, the burden of proof rests upon the plaintiff. The burden of proof is the burden of persuasion, it does not mean persuasion to a moral certainty or beyond a reasonable doubt, it merely means persuasion in the sense that you have concluded that it is more probable than not that the plaintiff has proved Item 1, Item 2, Item 3. The plaintiff gets absolutely zero unless he proves one plus two plus three. It will not do to succeed on one and not on another. All three of those items are essential for a recovery by the plaintiff, insofar as the plaintiff bears the burden of proof and if in your view that proof ought to include some item, if the item is missing then the plaintiff is to be blamed, not the defendant.

If in your view in order to satisfy the burden of proof, for example, certain customers or certain officers or certain other persons knowledgeable in one way or another by observation or in any relevant way are not here, and in your view ought to be there on the issues where the plaintiff **[2867]** bears the burden of proof, you cannot fault the defendant for the failure to bring these people. It is the plaintiff's obligation to bring the proof which satisfies you with respect to each of these issues.

Now, I'm going to turn to a general discussion, still as a matter of law, of the Sherman Act, and I think it is very necessary that you bear what I say in mind here carefully in your minds, because there was some argu-

ment which I think was in a direction contrary to what I am going to say, and what I am saying is binding on you.

When Congress passed the Sherman Act in 1890 it did not purport to deal with the whole field of unfair competition. I am not referring to the fact that it didn't deal with local as well as interstate matters. What I am saying to you is that Congress in the Sherman Act dealt with only some but not all kinds of unfair competition.

For example, Congress didn't deal with breaches of contract in ordinary cases. Congress did not deal with fraud, in ordinary cases. Congress did not deal with interference with advantageous business relations, in ordinary cases. Congress did not even deal with all unfair methods of doing business in interstate commerce. It was not until much later in the administration of Woodrow Wilson that Congress endeavored to reach unfair methods of doing business in interstate commerce, and then when it did it left **[2868]** the supervision of them to a commission, an administrative body, the Federal Trade Commission. There are some kinds of unfair means of doing business which are plainly unfair, some kinds of unfair, competition which are plainly unfair which are not covered by the Sherman Act.

There are many reasons for that. The Sherman Act in some of its aspects carries criminal penalties as well as civil sanctions. You are not dealing with the criminal side of this. Moreover, there are certain kinds of civil advantage which I am not going to discuss with you, because they are not your concern, but they are advantages which a plaintiff gets in this kind of proceeding

which he would not get in an ordinary unfair competition suit either in the federal or state courts.

So what you are here dealing with is a very special kind of statute. It has two main parts to it on the side of what is outlawed or forbidden or regarded as a violation, and one section has to do with combinations and contracts in restraint of trade, and that's covered by Section 1.

And the other part with which you are not the slightest bit concerned, is Section 2 which relates to monopolizing or attempting to monopolize commerce. Now this case has nothing to do with Section 2 of the Sherman Act. The pretrial statement makes it quite plain that what we are dealing with here is a claim of the violation of

[2869] Section 1 of the Sherman Act, which is directed at combinations, contracts and conspiracies in restraint of commerce. I am not going to spend any time talking to you about what the word "combination" means, or the word "contract" means, because I think it is quite plain to you at once that the words "combination" and "contract" involve the participation of more than one person.

If there is a restraint of trade participated in by more than one person and one of the persons has a purpose to accomplish the restraint and get the support of another person, it doesn't make any difference whether that other person shares the first person's purpose, motive or the like, it is sufficient that one of the parties to the combination has the specific intent and the other cooperates willy nilly. But the real difficult problem, and it's so difficult that nine justices of the Supreme Court wouldn't

agree on the point, is to define accurately the phrase "restraint of trade."

What every informed judge and justice would tell you is that it doesn't mean every restraint of trade. Ever since the time that as he then was Associate Justice, Edward Douglas White in 1911 decided the Standard Oil and American Tobacco cases, it has been clear that the only restraints of trade which the act applies to are unreasonable restraints of trade. That doesn't help you very much, but at least you know that there are some kind of restraints of trade which are **[2870]** covered and some that aren't. Mr. Justice Brandeis helped us a little bit more a half a dozen years later when he told you that you look at all the surrounding circumstances under which the restraint operates, and he pointed out what everybody always quotes him as saying, that every contract binds and restrains and it cannot be true that every contract is an impermissible restraint of trade.

Let me give you an example not unlike one I gave you the other day, perhaps a little closer to the problem here. A owns a business. X wants to buy it, Y wants to buy it, Z wants to buy it. A makes a contract to sell it to X. There were no other facts but those I have told you. Can it be that that contract is an impermissible restraint of trade? Of course it is a restraint which prevents Y from buying the business, because A is selling it to X, it's a restraint which prevents Z from buying the business, because A is selling it to X. But if you said that this was an impermissible restraint of trade then A couldn't sell the business to anybody. So it must be a reasonable restraint of trade, if all that is involved in

the situation is that a person who owns a business and enters into a contract to sell it to one of a number of difference persons and other persons are thereby, as it were, restrained from buying it. But now let me add another possible fact to the hypothetical case I have put.

[2871] Suppose that A is a very important factor in the market and has, let us say, 30 percent of the business. And let us suppose that X has 30 percent of the business, and Y and Z each have 20 percent of the business. And under these circumstances A, without giving Y and Z an opportunity to bid on the situation sells his 30 percent to X who already has 30, and the new AX company has 60 percent of the market, under those circumstances where the sale promotes or might be thought to promote an attempt to monopolize the market and to subject Y and Z to competition by an overwhelmingly strong antagonist, it very well might be that there is an impermissible unreasonable restraint of trade in that combination.

Now, with respect to restraints of trade I have to give you some general background, rather briefly, but in order that you may understand what this phrase "specific intent" means, which was used to you in argument and which I shall have to use in my charge.

First, let me tell you what the words "specific intent" as used in connection with Section 1 of the Sherman Act mean. Specific intent as there used means an intent either to monopolize or to exclude from the market, or engage in that kind of anticompetitive conduct which, as it were, freezes somebody out of the market or squeezes in a way which indicates something more than normal competition,

speaking generally, or a wrongful act of a defendant which might not possibly injure a **[2872]** competitor. But I told you quite a few moments ago that the Sherman Act doesn't cover every wrongful act. It doesn't cover every breach of contract. It doesn't cover every fraudulent act. It doesn't cover every kind of interference with advantageous contractual relations. It doesn't cover every kind of disparagement. It doesn't cover every kind of unfair method.

In order to satisfy the phrase "specific intent" as I said to you a moment ago, there must be, when specific intent is required, an intent to monopolize or to exclude from the market or to freeze out of the market or to squeeze by a peculiarly anti-competitive method. Merely injuring is not enough. Breaches of contract injure, or may. Frauds injure, or may.

Now, there are certain situations in which the plaintiff in order to succeed in a Sherman Act proceeding is not required to prove specific intent, because by a series of prior cases and rulings the courts have reached a conclusion that when you engage in a conduct of a certain kind there is an implied specific intent to monopolize, to exclude, to freeze, to squeeze, or whatever you like.

For example, if dominant forces, dominant enterprises in a given market agree to fix and maintain prices that is what is called in a Latin phrase a per se violation. That is on its face and by itself it is a violation of the **[2873]** law, and no matter what intent the parties had, it is a violation of the antitrust laws, provided that they are dominant enterprises in a market. Never mind what the reasoning back of it is, just accept what I tell you,

that under those circumstances specific intent need not be proved by the plaintiff in order to succeed.

If he proves a price agreement among dominant enterprises in the market, that's enough, provided he also shows, of course, that that action was a substantial cause of damage to him.

Now, there are other cases in which it would not possibly be open to a jury to find that there was a specific intent, and there are intermediate cases where specific intent must be proved by the plaintiff, or if it isn't proved by direct evidence it must be reasonably implied from the total factual situation, including the position of the defendant in the market and the nature of the conduct. That was a very abstract statement, and I am going to try to make it more concrete for you.

Suppose that in a particular market, and I'm going to tell you what a market is in a moment, the defendant has a dominant controlling position, and the defendant is a manufacturer of a particular kind of product, let us say shoe machinery. If the defendant refuses to sell such shoe machinery to people who want to buy it but only will **[2874]** agree to lease it on rental terms so that nobody can acquire the machinery except as a lessee, under those circumstances no matter what the intention of the manufacturer is the law implies that because of the dominant position which the machinery manufacturer has, and because of the interference with the freedom of choice of the proposed user of the machine there is a sufficient implied intent, and nothing need be proved beyond the position of the manufacturer in the market and

the form in which the manufacturer makes his product available exclusively by lease and never by sale.

There are situations which are quite different from that. But before I deal with them I am now going to interrupt my general train to drop a footnote to explain what the term "market" means, which I have been using frequently and which you have heard counsel use.

The word "market" may mean any identifiable branch of trade or commerce which has that kind of character which those who are in that trade or branch would recognize as creating a sufficient unity of demand and supply, so that there is, as it were, a market. And let me come right to the point of this case.

[2875] It is up to you to conclude that in this case there is a separate market for batch customers who use computer services or you may conclude that there is no such separate market and there is, in fact, only a market which includes all computer services, whether given on the basis of remote terminals or on the basis of batch deliveries.

The plaintiff has the burden of satisfying you that there is not only the larger market but, indeed, a smaller market, to wit, a market in which the demand and supply relate to batch data services rendered by computer centers. In other words, there can be a large market and a small market.

The plaintiff also has the burden of proving what is geographically the scope of the market. Of course, you could have a batch data market which covered the whole of the United States. You could have a batch data market

which covered the whole of the West. You could have a batch data market which covered just the City of San Francisco. You could have a batch data market which covered the Bay Area, including the various counties adjacent to San Francisco.

The plaintiff has the burden of satisfying you with respect to what are the appropriate markets. There may be more than one appropriate market.

If in what you find to be an appropriate market there are a number of different ways of satisfying the demand in that market, you will, of course, take it into account.

[2876] For example, with respect to batch data services in the Bay Area, you can take into account what centers there are that render such service by one or another type of machine.

It would be an impermissible restraint of trade if there is, in a given market, a dominant company which coerces customers and interferes with their freedom of choice. If there is coercion by a dominant force in the market, the plaintiff need not prove any further specific intent because the coercion, by itself, implies a specific intent either to monopolize or to exclude from the market or, as it were, to freeze or squeeze.

But, let us take another possibility, hypothetically considered, in order to make clear to you what the law is.

Suppose that a dominant force in the market makes false representations. By themselves, those are not sufficient facts to bring about a violation of Section I of the Sherman Act and to constitute an unreasonable restraint of trade. It is only under those circumstances when the

plaintiff proves that the defendant, in addition to being an important force in the market and in addition to having made false representations, did it with the specific intent to monopolize that market or to exclude the plaintiff from that market or to freeze the plaintiff out of the market or to squeeze that plaintiff in an anticompetitive manner.

I think I recognize how difficult this problem is; and **[2877]** that is one of the reasons that after I get through with my statements on the law, I am going to offer you an analysis which you are free to accept or reject.

What I have told you so far is a rule of law.

Now, if I turn from the problems raised by the first issue, that is, did the defendant violate Section I of the Sherman Act, I must help you in one aspect of law which is local and not the Act of Congress but the acts of the California Legislature and the California Courts.

You will surely remember that there was a great deal of testimony with respect to what kinds of pieces of paper and what kinds of contracts, if any, there were in 1970 which bound or did not bind customers to the Burroughs Data Center being operated in San Francisco. The question as to whether there were any contracts and, if there were contracts, they were as has been said, assignable or delegable with respect to performance is the reason I need now explain to you a question of law of California and not a question of Congressional law.

With respect to this phase of the case, the burden of proof is not upon the plaintiff, the burden is upon the defendant. The defendant has the burden of proving that

there were contracts and that they were delegable, assignable, with respect to performance.

It seems to be generally agreed that, on their face, these pieces of paper stated that they did not become contract **[2878]** unless they were approved in Detroit by the home office of Burroughs Corporation. So, no matter what Mr. Browne or anybody else may have said on the witness stand, it is the position in this litigation at this stage, taken by Burroughs, itself, that there were no written contracts which were in force and effect in 1970, before late in April or thereabout. They were signed in the home office in Detroit by Mr. Baily or someone there. But the defendant argues here that even though there were no written contracts in 1970, there were contracts by conduct.

Now, the law, with respect to this, is that it isn't necessary that contracts of this kind be in writing. Contracts of this kind can arise by conduct or orally or by the relationship of the parties in many different ways. And it is a question of fact for the jury as to whether, indeed, the relationship between Burroughs' center and its customers in 1970, in January, February, March, and so forth, shows that these customers and Burroughs, by their conduct, intended to be bound.

Now, it has been suggested that the relationship was an ongoing relationship. On the other hand, you are entitled to take into account that the parties may or may not have thought that they wanted the protection of a written agreement and they didn't intend to be bound unless they got a written agreement. That is a question of fact for you.

It may be that some of the customers, certainly not **[2879]** all of them, were charged different rates in 1970 from 1969 and they paid these higher rates and thus showed that they intended to be bound even without any signed approval from Detroit.

I am not trying to tell you whether the conduct did or did not amount to a contract by conduct instead of a contract in writing. It is all a question of fact for you.

The burden with respect to it, unlike the burden on most of the issues on this case, rests upon Burroughs, as defendant. If Burroughs does prove to your satisfaction, by a preponderance of the evidence, that there were contracts by conduct, Burroughs then has the burden of proving too that those were contracts which could be properly satisfied by Burroughs' getting the performance of the contracts done by somebody who was competent but who was not necessarily in the employ of Burroughs.

This has been referred to by the parties and the witnesses as though it were an assignable contract. That isn't exactly the right term, but it is a convenient one.

Was performance under these contracts delegable to somebody else? Could it be assigned to someone else? The plaintiff says no. And you will remember that Mr. Palmer said that, in his view, these contracts were not properly performable except by either the original computer center party or somebody who took over the business as a whole.

The position of the defendant is that contracts of **[2880]** this kind, whether in writing or arrived at by conduct, may be performed by anybody who is a reasonably decent, trustworthy workman-like operator of a computer center.

In that connection, the defendant calls to your attention the testimony of the degree to which this business has been assigned in the past and the evidence with respect to the assignment of business to various companies, including some not parties to this case, including the one, for example, that was testified to by Kalt.

I am not taking any position on this matter. It is for the jury.

I have tried to give you an illustration earlier in the case, as you will remember, but the illustration of the pencil factory and the opera singer, Madame Wagner, is perhaps no longer necessary to have you recall. It would be sufficient for you to think whether, after you have listened to all the testimony, you do or do not have a view that the defendant has proved that this kind of work may properly be delegated to any competent workmanlike, trustworthy enterprise.

After that excursion into the problem of contracts and their assignability, I now come back to the main issue in the case and turn to the question which is raised in regard to the plaintiff's claim that there was a substantial impact, as the plaintiff calls it.

In other words, did the defendant, if it violated **[2881]** Section I of the Sherman Act, substantially cause injury to the plaintiff.

Now, it isn't necessary, in order to satisfy its burden of proof, for the plaintiff to show that the defendant was the only cause of the injury. What the plaintiff must show by a preponderance of the evidence was and is that the defendant's wrongful conduct was a substantial cause of the injury.

Now, I would like to draw sharply your attention to something which I am not sure was brought out very clearly in the argument.

The types of injury to which reference was made and on which at least the plaintiff sought to calculate damages are of two different sorts. One is the injury with respect to, as it is claimed, the loss of the opportunity to earn money from Burroughs' customers, who were having their data processed at the Burroughs' center. The other claimed damage and injury was with respect to concerns which had never been customers of either Burroughs or of Computerminal.

If you come to the conclusion that there has been a violation of Section I of the Sherman Act, you may, as I will point out a little later in my analysis, treat these two classes of possible, theoretical customers as having a different kind of relationship, if any, to the alleged violation.

I now come to the third main issue which you may or **[2882]** may not arrive at.

You recognize I have to charge you on every issue raised. It doesn't mean that you have to consider every issue raised. You cannot find for the plaintiff unless you consider all of these issues, but you can find for the defendant without considering them.

This isn't a temptation to you to take the short cut. I am just telling you that the fact is that if you don't find any liability on the part of the defendant, if you don't find any violation of the Sherman Act by the defendant, you don't have to consider anything else.

Now, what about the rules of law with respect to damages? The plaintiff does have the burden of satisfying you by a preponderance of the evidence of the fact of damage, but it is recognized in many cases binding upon you and me that if you are satisfied that the plaintiff has borne the burden of proving the fact of damage, a considerable latitude is allowed with respect to the extent of damages.

If the defendant has, indeed, violated the Sherman Act and that violation has been a substantial cause of a particular kind of injury to a particular group of customers or through a particular group of customers, then if the plaintiff has also shown the fact of damage with respect to either or both of those kinds of customers, the defendant runs the risk that those figures cannot be very precisely ascertained because it is **[2883]** its wrongdoing, hypothetically, which has created the uncertainty.

Now, there is one other point that I must instruct you on with respect to damages. Notice carefully that on this point the defendant bears the burden of proof, not the plaintiff, just as with respect to the problem in connection with contracts and their assignability and whether or not they exist by conduct as well as by written agreement, the defendant has the burden of proof.

Before I come to state this issue, I want, in order to sharpen it, to distinguish another somewhat similar but different problem.

If a company is economically ailing and it is possible that it would have gone out of business through its poor management, or the like, the defendant does not get the benefit of that as an excuse for paying less in damages.

If I may give you a homely and frequent illustration, if the defendant, in a personal injury situation, were to hit a man who had had a heart attack and the man was seriously injured, the defendant has to pay for the injury even though, if the man had had no heart attack, the injury might not have been so serious.

You take, in a personal injury or other tort action, including an antitrust action, the plaintiff as he is. And if the defendant injures a weak and sickly corporation and the injury is worse than it would be if it were a healthy **[2884]** corporation, that is no excuse in mitigation of damages.

However, what the defendant claims here is something different. And I am not saying that the claim is sound, I am just placing it in front of you for your consideration, reminding you that on this issue the defendant has the burden of proof.

The defendant says that in this particular case the plaintiff was under a contract to go out of business and, therefore, the period of damage cannot last longer than the period during which the plaintiff had contracted to stay in business or had contracted that it would go out of business. Obviously, if a corporation were created by the legislature to be not a perpetual corporation but a corporation which was to last ten years and you injured the corporation in its ninth year, the only damages which the corporation could get would be what it would have lost in earning power in the tenth year. You couldn't take into account the twelfth, fifteenth, or nineteenth year as you may in the case of a corporation which had perpetual life.

Now, it is the claim of the defendant in this case that as a result of negotiations originated perhaps by Mr. Wessel—it is up to you whether you agree with this—but it is the defendant's contention that there were negotiations between Mr. Wessel and Mr. Leidersdorf and Mr. Coleman, representing either himself or Mrs. Coleman or both, and there were [2885] contributions made in the Winter of 1969-1970 under which there was an express agreement that if the remote batch business didn't work out within the period of time contemplated, the whole of the business of Computerminal, batch data as well as everything else, would be abandoned and there was a subscription, according to the defendant, made on that basis and accepted on that basis by Computerminal and that there, therefore, was, in the defendant's view, a contract of termination; so that there could not have been, no matter what the defendant did, any interference with the operations or possible revenues of the plaintiff beyond the period of time which the defendant was to remain in business, the plaintiff having agreed, in the defendant's view, to go out of business, as it turned out, when there was a failure of financing, and going out of business would have occurred, in any event, according to the defendant, in the Summer of 1970.

It is up to the defendant to bear the burden of all of that, and you don't have to believe any of it. You don't have to believe that Mr. Wessel made any such arrangement or that he had any authority to or that there was any ratification of it by a subscription or that there was any firm agreement on the part of the corporation or that the corporation would have gone out of business anyway.

But if you do believe all of those things, if the defendant does persuade you, then that would, of course, impose [2886] a legal limitation upon the period that the corporation would have remained in business, regardless of any wrongdoing, if there were any, of the defendant. And that is a fact that has to be taken into account in connection with damages.

Now, I have, I think, said all that I want to say except one other point of law before I turn to the analysis.

You will bear in mind that the pretrial statement and Paragraph 19 of the complaint, as well, make it abundantly clear that the wrong here complained of and here before you for adjudication has to do with an alleged combination between the defendant Burroughs and Cubit and/or customers. If there were any such agreement, it is said to have been one with respect to or having the effect of interfering with the plaintiff's, Computerminal's, rights, not some individual rights.

If there were any such contract, combination, or conspiracy, Paragraph 19 of the complaint and the pretrial statement make it plain that it reached its culmination by the contract of April 16, 1970. That is the date.

I have said all I am going to say about the law, and now I am going to turn to problems of analysis. I underline as strongly as I can that from now on anything I say you may disregard. I am not now hereafter giving you any instructions on the law.

[2887] This is not entitled to any more weight than you want to give it. It may or may not help you. You may or may not think it's fair. I am going to try to be

fair. As I listened to the arguments, I hope I correctly understood that there was a threefold thrust by Mr. Alioto on behalf of the plaintiff in his argument to you as to why he has shown that there was a prohibited unreasonable restraint of trade by Burroughs.

Now, if I understood him correctly he said, first, there was a specific intent to destroy Computerminal; and, second, he said that the whole situation was one involving coercion by Computerminal and Cubit with respect to customers which Burroughs already had; and, third, he said that there were implied and expressed misrepresentations made by Burroughs which in some cases reached directly to the Burroughs customers and in other cases some how or other floated down a grapevine, if you float down a grapevine, at any rate, went down a grapevine in the direction of the total potential market of potential customers, not only those that Burroughs already had or that Computerminal already had, but those that might by possibility show up in the San Francisco area.

Now, let me look at these three different situations or claimed situations, and they may be cumulative, one as well as the other, or they may be alternative, one instead of the other.

[2888] Did the plaintiff show by a preponderance of the evidence that the defendant had a specific intent to destroy Computerminal? Well, let's take the strongest thing which wasn't, for some reason, much played upon in the arguments.

Mr. Browne didn't have a very lovely attitude toward the plaintiffs, at least by the time the deal fell through,

and there is no doubt he wrote a rather ill-tempered memorandum. But there is no evidence, is there, that anybody acted on that memorandum? There is no reason, is there, to suppose that that particular remark, which surely was not one of encouragement, ever got any approval from either Mr. Baily or anybody else in real authority at Burroughs, or that it was followed up in any way whatsoever? And it is pointed out to you by the defendant that if there were really a specific intent to destroy Computerminal, it's rather strange that Burroughs didn't do what it had a perfect right to do, to recapture the machine for non-payment of rent. Burroughs allowed unpaid rent to accumulate until it was over $100,000 and was, as has been pointed out to you, the real method of financing Computerminal in the continuation of its business. So it's rather hard, isn't it, to look at this evidence and say that Burroughs started out with the intent to destroy Computerminal.

But now let's look at the second of these, as it were, strings to the bow of Mr. Alioto with respect to restraint **[2889]** of trade. You will remember that during the examination of Mr. Browne and at other stages in the case it was brought out by Mr. Alioto that Burroughs was in an ambiguous situation of being both the manufacturer of machines, and in San Francisco the operator or user of the machines in a center, and that in its capacity as operator or user of machines, Burroughs was in potential, if not actual competition with every other user of Burroughs' machines including, of course, Computerminal and including Cubit, and the suggestion made to you is that it was under these circumstances rather coercive for

Burroughs together with one of its competitors at the computer center level, i.e., Cubit, to go to customers of Burroughs and try to persuade them to deal with Cubit and not to deal with anyone else. It is certainly at least a ground for careful inquiry when a manufacturer of a product accompanies one of the users of its product in going to ultimate customers and urging those ultimate customers to use or to take their business to a particular lessee or purchaser of the manufacturer's machines. On its face this could be found but not must be found to be a restraint and interference with the free market.

However, you are also to take into account not only that aspect which on its face invites scrutiny, but you are to realize that in this particular situation the manufacturer was not just going around with one user of machines to see **[2890]** ultimate consumers, the manufacturer was going out of business in its own capacity as a user in San Francisco of its own machines. The defendant points out that in its view it was trying to salvage what it had here in San Francisco. It had made up its mind to go out of business in San Francisco and it wanted to get as much as it could for whatever it had in the way of good will, i.e., customers.

Now, you will remember that early in this charge I referred to the problem of A who owns a business and wants to sell it and X, Y and Z are possible purchasers, and A sells to X and that cuts out Y and Z. And that it must be permissible for A to sell to somebody, even though it does have an adverse effect on the people who want to purchase it, they are restrained but not unreasonably restrained, because if you didn't let A sell to

anybody you are really saying you have got to take a loss, you can't sell your business.

Now, surely, the antitrust laws don't prevent Burroughs in its capacity as the operator of a center in San Francisco from selling its business. Surely, the antitrust laws don't operate to prevent Burroughs selling its customer list, and if it has contracts, from selling contracts, or even the hope of contracts.

So the problem is really whether there was any coercion in these particular circumstances, or whether what was going on was merely a salvaging of the business.

[2891] Now, in stating the argument both ways, I hope you don't think I am deciding that issue, because that's an issue for you, but that's the problem.

Now, with respect to this, of course, a lot turns on what went on at those conferences. And remember, who has the burden of proof to bring the witnesses. Are you satisfied that you really know what went on at those conferences? Remember that it's the plaintiff's claim that there were a number of customers who were being coerced. I hope I don't misstate it when I say that the only customer that testified here in person, Mr. Zusman, didn't seem to think he had been coerced. And although Mr. Arnstein of Forbes may have taken a different position, all we know about him is what was read in evidence from some prior testimony of his, not by any means a complete account of what he testified on that occasion.

We also know, of course, what Mr. Browne said. And it is perfectly true that Cubit is a named conspirator,

and you might not expect Cubit to be called, or you might think Cubit would be called, it's up to you.

Now, let's look at the third string to the bow, the supposed misrepresentation.

Now, Mr. Alioto in his examination of the witnesses certainly took quite a little time, and I didn't mean that he took too much time, to bring out what was said by Mr. Browne **[2892]** and others. But most particularly by Mr. Browne, and what the correspondence and notes, notices and so forth said about these 1970 pieces of paper or contracts. I don't think you and I would give Mr. Browne a certificate as a representative who understood the law very well before he testified.

And I don't think that you or I would be much impressed with his consistency. I certainly made it plain that I thought he had said one thing one day and another thing another day. And I am not sure if even now he has a clear idea, for that matter, I am not sure that anybody has a clear idea about what the legal situation is with respect to those pieces of paper, because until you have spoken we don't know whether there were contracts by conduct.

There may have been a correct representation, there may have been an incorrect representation. We don't know until you have spoken whether those contracts were able to be performed according to their implied intent by any competent company or not. The plaintiff has the burden of showing there was a misrepresentation, but if there were a misrepresentation the defendant could certainly avoid its effect by showing that it was made in

good faith. But the defendant would have the burden of showing that it was made in good faith.

Now, you may remember, going back to where I first started to tell you about the complexities of the law with **[2893]** respect to restraint of trade and telling you that I didn't think even all justices of the Supreme Court of the United States would agree upon it, I did make plain to you that when you were dealing with alleged fraudulent misrepresentation or alleged bona fide negligent misrepresentation, there is no violation of the Sherman Act. There is no restraint of trade prohibited by Section 1, unless there is, in addition to the misrepresentation, either a dominant control of the market with an anti-competitive intent or, alternatively, a specific intent to monopolize, to exclude, to freeze out of the market, to squeeze in some way beyond merely injuring.

Now, I hope you realize the difficulties these problems are. They are ones in which the common sense of the jury perhaps governs much more than is always recognized, because ultimately, frankly, issues of this kind turn to a large extent upon credibility. You listened to arguments yesterday as to who is truthful, if anybody, and how truthful. As I listened to the testimony I could not help thinking of a line which some of you will know, from Shakespeare's sonnet, which talks about that not being love which alters when it alteration finds; that is not truth which alters when it alteration finds. Or, as Archbishop Whately said, there is all the difference in the world between putting truth in the first place and the second. And you are just as good in judging truthfulness as any group of people ever will be.

[2894] Now, if you do find that there has been a restraint, you will then have to deal with the question of causation. Now, I, in talking to you about the law, and before I came to the analysis which you are not required to follow, noted that there were two different supposed kinds of customers who would otherwise have given business to Computerminal but who were diverted by the violation of the antitrust laws as claimed.

Now, look at the position of these two classes of customers. There is no doubt, of course, that Burroughs was in touch with its own customers. Burroughs went around and visited its own customers. But what did Burroughs say to its customers? Is there a word of explicit kind indicating that Burroughs ever said anything disparaging about Computerminal. Of course you may disparage without being explicit. If at the moment I were to praise Mr. Alioto and to say nothing about Mr. Gillam, I think in this context you would conclude that I was not only praising Mr. Alioto but dispraising Mr. Gillam, because it would be rather unusual, wouldn't it, in the course of a matter of this kind for me to single out one lawyer for praise unless there was some very exceptional situation.

But here we face the rather peculiar situation that if Burroughs by praising Cubit is supposed to have dispraised Computerminal, why isn't it equally true that Burroughs was dispraising every other batch data center in San Francisco. [2895] And has anybody said that others thought they were being disparaged? Is there any proof of that?

Now, what about the people who weren't customers of Burroughs but were potential customers. There are people

around San Francisco who have or might have batch data work to be done. There is no claim that Burroughs went to see them. But we are told that a grapevine somehow reached them.

What is traveling on this grapevine? That Burroughs sent its work to Cubit? Is there anything traveling on this grapevine about Computerminal? And if it's traveling on this grapevine does the grapevine also say that Burroughs has still left its machine with Computerminal even though Computerminal hasn't paid all of the rent? What kind of grapevine is this?

If the grapevine carries the story that Computerminal isn't paying its rent, it happens to be true.

Well, I am not going to say anything at all about damages. I am well aware that about 60 percent of the testimony and more dealt with damages, and maybe almost as much of the argument. If you didn't get what the testimony had to say and what counsel had to say on that, I don't think you will be much enlightened by what I would say. I tell you once more that in connection with this case the burden of proof on each of the three main issues rests on the plaintiff, but there are certain subsidiary issues that I have referred to [2895-A] such as the supposed contracts and the supposed assignment and any privileges with respect to truth with regard to representation, and any suggestion that there is a shorter life of Computerminal because of its supposed contract with Messrs. Leidesdorf and Coleman are issues as to which the burden of proof rests upon the defendant.

[2896] I have tried in the analysis to look at the matter with detachment, but you don't know whether any-

body can state a matter so that everybody thinks it is detached. I hope I have the kind of bias against bias which I referred to before. I know that, like everybody else, I am bound to have a certain number of prejudices, but I do my best to combat it.

In the end, I would say that the reason it is so fortunate to have a jury case instead of an nonjury case in this field is because, as I have repeatedly said, the ultimate test here will turn out, I am sure, to be credibility.

Everyone who comes into a court swears by God to tell the truth, the whole truth, and nothing but the truth. I doubt very much whether many people who take the oath fear Jehovah, but most of them fear jurors.

You may or may not think that someday you will face St. Peter or, in the inferno, Minos, but you are in the position, as it were, of the eternal judge of the truth of this matter. You are engaged in a very solemn undertaking.

This is not a simple case, and I have not been able to reduce it to an easy problem because it isn't easy.

I have been in the habit of saying, for many, many years, that when my children were young and I was already a judge, at the end of a jury case, I would go home and tell my children, as best I could, what were the facts in the case and try to get from them a judgment as to how the case should be [2897] decided. In one sense, it worked very well. Both my children have become lawyers.

I am not suggesting that your children will become lawyers, but if you do this job before you in the spirit

of imagining that you are to tell your children or grandchildren about this case and what you decided, if you have that sense of consciousness that you would have when you were in the position of instructing the young, I have very little doubt that you will reach a sound verdict.

Mr. Clerk, will you please pass the two forms to the Foreman, number one? I don't know whether he is the Foreman or not.

You will see one form is for plaintiff and one form is for defendant. If you find for the plaintiff, you put in a figure in dollars. You don't give us any real reasons or anything of that sort, you just put down the figure. If you find for the defendant, you just fill out the form without any figure.

You, of course, are required to be unanimous, the six of you.

Needless to say, when you go into the jury room, you may start with a difference of opinion. Listen attentively to one another. You are just as good a jury as ever is going to sit on this case. It is very important that you be decisive. After all, it has taken a month of your time, a month and more, [2898] and a great deal more of Counsel's time, and a month of the Judge's time, not to mention the parties' and the witnesses' time. It has been an expensive business no matter how it comes out.

Nobody is going to compel you to reach a verdict against your conscience.

It may very well be that you can return a verdict in a very short time. Maybe you can't, but, as I have indi-

cated, if you can't do it quickly, I intend to hold you. If you do it quickly, that is all right, but I am not urging you to avoid staying overnight. That is up to you to act conscientiously.

Is there anything else, gentlemen?

Mr. Alioto: No, Your Honor.

Mr. Gillam: No, Your Honor.

The Court: Will you please retire to consider your verdict under the circumstances usual in this Court, whatever they may be.

Appendix B

No. C 71-479 SAW

United States District Court,
N. D. California.

Stuart M. Kaplan as Trustee in Bankruptcy for Palmer Data Corporation d/b/a CompuTerminal

v.

Burroughs Corporation.

Feb. 4, 1977.

FINDINGS OF FACT AND OPINION

WYZANSKI, Senior District Judge.

This case is reduced to one issue: whether there is evidence to support a jury verdict that defendant has violated Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, as distinct from any question of state tort law.

In *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir., 1974) that distinction is so sharply drawn and so cogently explained that it is unnecessary for any district judge again to tread the path of legal analysis, public policy, and historical considerations there set forth by Chief Judge Coffin. The recent, January 25, 1977 decision by The Supreme Court of The United States in *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 1976, ... U.S. ....., 97 S.Ct. 690, 50 L.Ed.2d 701 applied cognate principles in a closely allied matter.

Hence a distict court judge's function is primarily to apply those principles to a particular case.

Here there have been three jury trials of plaintiff's[1] complaint that defendant has injured his assignor by alleged restraints of trade in violation of Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1. Plaintiff's pleading and the pre-trial orders (shown in the charge appended hereto) make it clear that plaintiff does not claim that defendant has engaged in any *per se* violation, such as price-fixing or attempts to control the market by invidious practices. What plaintiff relies on is a series of defendant's actions, including an alleged conspiratorial contract and combination with Cubit, Inc., said to have been aimed at the destruction of CompuTerminal's business.

In the first trial, before Judge Weigel, the jury returned a verdict for plaintiff of actual damages (before trebling) of over one million dollars. Judge Weigel at first set aside only that part of the verdict which determined the amount of damages, but left undisturbed that part which determined liability. In the second trial, again before Judge Weigel, another jury determined by its verdict that plaintiff had suffered no damages whatsoever. Then Judge Weigel set aside both that second verdict and the surviving or liability part of the verdict of the first jury. Thereafter, he transferred the case to me.

In a third trial, lasting over a month, before me, the jury, after my charge, returned a verdict for plaintiff in the amount of $1,162,000, before trebling. Orally, in open

[1]As here used, plaintiff means either Kaplan or his predecessor trustee in bankruptcy, Walsh.

court, on April 28, 1976, and by written order dated April 29, 1976, I denied defendant's motion for judgment notwithstanding the verdict, but granted defendant's motion to set aside the verdict. In an accompanying brief opinion I stated that as I *then* viewed the evidence plaintiff had shown defendant's liability but had not proved such large damages as to support the size of the verdict.

By a collateral action, plaintiff unsuccessfully petitioned the Court of Appeals for the Ninth Circuit to issue a writ of mandamus to this Court to re-instate either the third jury's or the first jury's verdict. Then plaintiff unsuccessfully petitioned the Supreme Court to grant certiorari to review the judgment of the Court of Appeals. (See *Walsh v. United States District Court,* and *Burroughs Corporation,* 429 U.S. 859, 97 S.Ct. 160, 50 L.Ed.2d 137.)

His mandamus action having failed, plaintiff moved in this Court for reconsideration of this Court's April 1976 action setting aside the third jury's verdict, and alternatively, moved that this Court "certify", as his counsel expressed it, this case to the Court of Appeals. Simultaneously, defendant renewed its motion for judgment n. o. v. and moved for partial summary judgment upon a part of plaintiff's claim of damages. On November 15, 1976, during argument upon these rival motions, counsel and this Court recognized that in the present posture of this case, no final judgment having been entered, and no direct appeal having been taken, this Court was free to reconsider both of its April 1976 orders—, the one denying defendant's motion for judgment notwithstanding the verdict and the other granting defendant's motion for a new trial.

Many months having elapsed since the third jury's verdict, and the Supreme Court, in *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 1976, ... U.S. ....., 97 S.Ct. 690, 50 L.Ed.2d 701, having held that, in private anti-trust cases of no merit, it may be appropriate to enter a judgment, on a defendant's motion against plaintiff's damage claim, notwithstanding the verdict of a jury for plaintiff, this Court has a perspective on the case. This Court has become cognizant, in the way that an appellate court might be aware, that some of the trial judge's 1976 statements during the trial, in the charge, and even in the April 1976 opinion are either erroneous or of doubtful soundness. They do not reflect as accurately as could an opinion written after the heat of battle has subsided, what is revealed by a meticulous, prolonged, and thoughtful study of the record and of the governing principles of law.

Written with the advantage of almost a year's lapse of time since the third jury's verdict, this opinion now addresses itself to what, *in the view most favorable to plaintiff*, this record shows.

Looking today at the record in the third jury trial, this Court, *disregarding and withdrawing its earlier and less-considered statements made in April 1976,* now sees the case, as viewed most favorably to plaintiff, as presenting the following set of facts.

Plaintiff Kaplan is the successor to plaintiff Walsh as trustee in bankruptcy for Palmer Data Corporation which became the assignee of CompuTerminal Corporation.

CompuTerminal planned to enter on a large scale the remote batch-data center buiness, but meanwhile had begun

business in 1969 in San Francisco in conventional batch-data processing. That is the business of supplying to local customers a computer service rendered upon machines operated by, and either owned or leased by, the processor. The material fed to the computer is derived from a customer's original records, which he may deliver or which the processor may collect. Before such material is so fed, it is categorized according to a system devised by the processor to suit the requirements of the particular customer.

Remote data processing differs from conventional batch-data processing primarily because the customer has electronic or like connections with a remote data center, so that records do not have to be physically transmitted.

Defendant Burroughs Corporation is one of the largest American manufacturers of computers. It has operated only once in its history a batch-data center directly serving those customers who have material to be processed by computers. This unique entry into the batch-data market occurred when, invited to do so by UNIVAC, Burroughs took over an unsuccessful enterprise which had been operated by UNIVAC, the R & S Division of Sperry-Rand Corporation. Sperry-Rand had previously acquired this enterprise from R & S. That enterprise, as lessee, used some of Burroughs' machines on which it was hardly earning the rent. When Burroughs took over the enterprise it paid to Sperry-Rand $75,000 in cash; it assumed or canceled the Sperry-Rand leases of Burroughs' B-300 machine (which rented for $240,000 a year); it took on many of the enterprise's employees; it assumed and fulfilled Sperry-Rand's obligations to customers on outstanding service

contracts; and it spent another $75,000 to "clean up" customer programs.

During the time that Burroughs operated its so-called "conventional" batch-data center in San Francisco, Burroughs had leased to CompuTerminal for use in its batch-data center an old type Burroughs machine.

CompuTerminal then had a total of twenty or thirty customers for whom it had prepared individually appropriate systems, and for whom it rendered conventional batch-data services. It wanted to expand that business, but it was more concerned with what it regarded as its long-range, potentially-profitable, major activity—the establishment of outstanding so-called "remote" batch-data centers which would occupy elaborate quarters and which would own and operate forty of the most advanced type of Burroughs computers, numbered B5500. With those objects in mind, CompuTerminal had in 1969 leased at high annual cost elaborate offices in San Francisco; it had engaged a large stand-by staff of employees; and, it had entered into a fifty million dollar contract with Burroughs to take on that company's new, most advanced machines. Both CompuTerminal and Burroughs co-operatively gave widespread publicity to this proposed acquisition of new machines.

At no time did the gross income of CompuTerminal from rendering batch-data services and from other sources come close to covering the company's out-of-pocket expenses.

During the so-called start-up of CompuTerminal some substantial losses were predicted, some would have been foreseeable, and some would have been justifiable in

the light of entreprenurial risks associated with embarking upon a new enterprise, which it was hoped would move from a condition of initial losses in getting going, to a condition of profitability after the business had acquired customers, had shaken-down its crew, had achieved a momentum, and, most important, had embarked on a program of remote batch-data center operations.

However, in its 1969-1970 start-up period the actual *total* losses which CompuTerminal sustained were so gigantic that they could not be found by any reasonable jury to have been wholly justifiable. CompuTerminal's capital was so depleted that insolvency was imminent by the end of 1969.

Nor did those who directed CompuTerminal, not even its president, Palmer, regard the total losses as corresponding to their advance expectations, or to their retrospective judgment of what was justifiable. CompuTerminal, unable to secure the requisite financing for its proposed remote batch-data or its existing conventional batch-data processing, itself canceled its order to acquire from Burroughs the forty new computers. Two of the principal investors who had supplied CompuTerminal with additional capital, acting through their attorney, demanded that if by the summer of 1970 CompuTerminal did not turn the financial corner and make a profit it should go out of business. There is a dispute whether this demand was acceded to by CompuTerminal. But the dispute is immaterial, inasmuch as it is conceded that the demand was drawn to the attention of both Palmer and CompuTerminal's Board of Directors, and that when CompuTerminal did not turn the corner, within the time specified in the demand, its directors and shareholders in

July 1970 voted to assign, and did assign, all the corporate assets to Palmer Data Corporation.

While CompuTerminal was in its 1969-1970 start-up period, Burrough's employee, Browne, who had only authority to survey the San Francisco and like operations, to observe actual and potential customers' activities, to solicit their business, and to make recommendations with respect to the continued operation by Burroughs of its San Francisco batch-data center, in a memorandum dated January 15, 1970, advised his superior, Bailey, that, of possible options open to it, Burroughs should close the San Francisco center, and should offer, to the best available buyer, the Burroughs San Francisco business, which,—in effect, meant its goodwill, its customer list, and (so far as there were any), assignable contracts which the center had had with customers. The home office of Burroughs gave Browne approval to carry out the plan.

The then situation was that over some years there had been between Burroughs, or its predecessor, UNIVAC of Sperry-Rand, and twenty or so customers *written* contracts with stipulated rates. All of these written contracts had expired. The customers had signed new forms which specifically stated that they were not to constitute binding contracts until they were executed by Burroughs at its home office. No such executions had occurred. Services were, nonetheless, continuously rendered as though there had been executions. Sometimes higher rates had been provided in these unexecuted forms than in the expired written contracts. The customers paid such higher rates. Some customers assumed that Burroughs had indeed executed the originals,—although in fact no execution by Burroughs occurred until late April 1970.

Browne sought to carry through his approved plan in February and March 1970 by offering Burroughs' San Francisco center to CompuTerminal. Largely because Palmer, the president of CompuTerminal, did not believe that the customers of Burroughs were legally bound under unexecuted contracts, Palmer concluded that Burroughs had nothing to sell, and refused to buy.

Browne, irritated by Palmer, then wrote, on April 16, 1970, a memorandum to his superior Bailey advising Bailey to inform Palmer that Burroughs would take a "dim view" of future relations with CompuTerminal. The uncontradicted testimony is that Bailey did not follow that advice in that internal office memorandum. No "dim view" was, in fact, taken by Burroughs, which even continued to allow CompuTerminal to keep a Burroughs computer which was subject to immediate recapture for non-payment of rent.

The circumstances, uncontradicted by any specific evidence or any plausible inference, permit of only one interpretation: Browne's *sole* motive and intent in so writing was to injure CompuTerminal because it would not go along with Browne's plan to have it buy the center. There is not the slightest factual basis for an inference that Browne had a motive or an intent to restrain commerce, to monopolize commerce, or to engage in any of those types of misconduct which were the express or implied objects of the Sherman Anti-Trust Act.

Nor was Browne's intent, whatever it was, followed by any action of Burroughs to carry out that intent.

When Browne represented to Palmer, and later to Cubit and to Burrough's customers that the customers of Burroughs who had signed agreements for renewal contracts were legally bound, even though Burroughs on its part had not yet formally executed such agreements, he did not make a factual or legal misrepresentation. Burroughs in rendering the contemplated services at the stipulated prices after a customer had signed an agreement became, as a matter of fact and as a matter of law, bound as effectively as if it had signed the agreement. (My earlier action in leaving the issue to the jury was erroneous.)

After Palmer rejected the opportunity to buy the Burroughs San Francisco center, Browne in March and April 1970 offered the business to Cubit. That enterprise was located in Burlingame on the Peninsula, twenty or so miles from San Francisco. In order to induce Cubit to buy the business, Browne, acting for Burroughs, (1) offered to sell to Cubit Burroughs' entire San Francisco business including an old style Burroughs B-300 which had been on the premises since UNIVAC operated the center; (2) helped Cubit to get from a bank a loan; and (3) (on a view of the evidence most favorable to plaintiff) joined Cubit in falsely representing to the bank that the whole proceeds of the loan were to purchase the B-300 machine.

If Browne made a misrepresentation to the bank (which is doubtful if the oral as well as the written evidence be considered), Browne was acting far outside his actual or ostensible authority. Burroughs did not give him, nor appear to give him, any power to help a purchaser to get funds to buy the San Francisco center. Helping a potential purchaser to get a bank loan is not within the normal range of the

powers of an agent authorized to make sales of property. Browne's representations to the bank were not authorized by, nor ratified by, nor legally attributable to Burroughs.

There is not the slightest factual basis in the bank loan, or in any other circumstances, for an inference that Browne or Burroughs or Cubit had an intent to restrain commerce, to destroy CompuTerminal, to monopolize commerce, or to engage in any of those types of misconduct which were the express or implied objects of the Sherman Anti-Trust Act. The only purpose that Browne or Burroughs had was to salvage what it could from its less than successful San Francisco operations. The only purpose of Cubit was to enter the San Francisco conventional batch-data market.

Browne, as a further inducement to Cubit to purchase the business of Burroughs' San Francisco center, promised Cubit to introduce Cubit's representatives to Burroughs' San Francisco customers. After Cubit on April 15, 1970 did agree to buy the center, Browne did make the introductions.

Browne went further by writing two sets of follow-up letters which indicated that Burroughs was transferring its San Francisco center to Cubit, that the customers' accounts were being assigned to Cubit, and that if the customers did not agree to the assignment they would be left without service after seventy days.

Most of Burroughs' customers were easily persuaded by Browne's visits and letters to make the change from Burroughs to Cubit. Some were not. Browne represented, at least sometimes, that the customer was already bound to Burroughs by an unexecuted agreement, that Burroughs had a right to delegate to Cubit performance of that con-

tract to a competent substitute, and that, in any event, the agreement was terminable after a specified ninety day period. Such representations, as a matter of fact and of law, were true and not false or misleading. (My earlier action in leaving to the jury the question as to the right of delegation was erroneous.)

Both Burroughs and the customer having acted upon unexecuted agreements, which were in form the same as those of earlier years but were often different in rates of payment, those unexecuted agreements had become binding contracts, but terminable by Burroughs on ninety days' notice. (My earlier instruction to the jury on this point was erroneous.)

Moreover, the services rendered by Burroughs under such agreements were not "personal"—the duty to perform was delegable. The services were like those banking services which a bank customarily performs for a customer in connection with an account in which the customer makes deposits and from which he authorizes withdrawals, and which a bank, when it goes out of business, may delegate for performance by its successor bank. They could be transferred for performance in connection with the sales of Burroughs' Service Center's business, even though some of the information may have been confidential.

Although Burroughs had the unqualified right to transfer to Cubit performance of contracts of customers, without their consent, when customers objected Burroughs, as a matter of business policy, did not exercise such right, except perhaps in one or two instances.

Pursuant to its sale to Cubit by the agreement effective April 15, 1970, Burroughs then entirely withdrew from the business of rendering in San Francisco or elsewhere any batch-data services. It had no concern with CompuTerminal or with batch-data customers of any enterprise.

On July 15, 1970 the shareholders of CompuTerminal voted to sell its whole business to Palmer Data Corporation. The transfer of assets to, and the assumption of liabilities by, Palmer Data Corporation followed on July 17, 1970.

All the documents and statements of Palmer and of others associated with CompuTerminal and Palmer Data Corporation which were *contemporary* with the sale and transfer of the business make only one conclusion plausible: the transfer was effectuated solely because, quite apart from Burroughs' or Browne's activities, CompuTerminal had lost almost all its capital through CompuTerminal's directors', officers' and supporters' misjudgments of the market possibilities, of the abilities of Palmer, and of the general economic picture. This is underlined by what was repeatedly written and said by Palmer himself in 1970 and by those who were investors in and officers or directors of the very corporation which held the only possible cause of action in this case. These individuals were connected solely with CompuTerminal, and in no way with Burroughs. Their statements were against their own interest, were not contradicted by any statements made before this action was brought, and, collectively, present an unadorned picture of failure of CompuTerminal due to factors wholly independent of Burroughs.

Nor is there in the *contemporary* 1969-1970 documents, accounts books, statements, or other evidence the slightest ground for regarding as even a secondary or minor cause of CompuTerminal's failure the conduct of Burroughs, or of Browne, or of anyone associated with the defendant.

Despite this clear picture which the contemporary evidence discloses, Palmer, long after the collapse of CompuTerminal, claimed that CompuTerminal had been damaged by alleged violations by Burroughs of the Sherman Anti-Trust Act.

As page after page of the transcript vividly portrays, Palmer at the trial of this case shifted his testimony with flexibility. Responding to his counsel's suggestions, he trimmed his opinions to meet developments as the evidence in one day's testimony after another day's testimony seemed to make desirable.

Palmer on the witness stand took the position that CompuTerminal had lost its capital and its potential profits due to statements made by Browne and other employees of Burroughs to Burroughs' customers to disparage CompuTerminal as a possible substitute service-center when Burroughs went out of business, and due to "coercive" tactics Burroughs followed in inducing its former customers to go to Cubit instead of Burroughs.

This was mere argument, not conclusions tied to any specific evidence. Indeed, as noted above, the testimony was the other way. There was no evidence whatsoever that Burroughs' representatives either directly or indirectly disparaged CompuTerminal or "coerced" Burroughs' customers to accept Cubit as Burroughs' delegate for performance.

Nor did Burroughs have any anti-competitive plan to put CompuTerminal out of business. On the contrary, Burroughs for a long time hoped to have CompuTerminal as its customer for a large order of its best machines, and did what it could to help CompuTerminal buy such equipment. Moreover, when CompuTerminal did not pay on the due date the rental on its leased Burroughs' machine, Burroughs did not promptly remove the machine and cancel the lease. Not until CompuTerminal became obviously insolvent did Burroughs assert its recapture rights.

Palmer sought to fill the gap in specific factual evidence by so-called expert opinion. *This was not in fact opinion evidence but consisted of statements which were unsupported by factual testimony* and were inflationary, inaccurate, imaginative, and inconsistent. Palmer ignored the obvious facts that CompuTerminal was a business which neve. had much capital, which had not developed the market which Palmer had predicted, which had no longer enough working-capital to continue business, and which was being pushed by its principal investors to close its doors because it was over-extended.

No responsible judge could allow to stand a jury verdict which reflected Palmer's unsupported so-called expert opinions and methods of so-called calculation.

The analogies between *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* and the instant case are striking. To be sure, that case arose under Section 7 of the Clayton Act, whereas this case is claimed by plaintiff to arise under Section 1 of the Sherman Act. The penumbra of both sections of statutory law and the canons of inter-

pretation make the two cases cognate. Each of the statutory sections is directed only at so-called anti-competitive conduct and anti-competitive intention; and where neither conduct nor intention is anti-competitive, then neither the Clayton Act nor the Sherman Act is violated.

Hence it is highly significant that the *Brunswick* case and the case at bar are so similar in their essentials. In *Brunswick* a manufacturer, solely in order to salvage its interest in its equipment which it had sold to an enterprise, took over the business of the user of the manufacturer's machinery; here, a manufacturer, solely in order to salvage its interest in the use of equipment which it had leased to an enterprise, took over the business of the user of the manufacturer's machinery, and, then when the manufacturer found that the take-over was not advantageous, solely in order to continue the efforts at salvage, disposed of the machinery and the acquired business, after first offering it to plaintiff, to the best available purchaser, Cubit.

In sum, here as in *Brunswick* we have nothing but a complaint that plaintiff did not like the competition of a manufacturer who had no intent to put plaintiff out of business, but who merely engaged in a salvage operation.

Moreover, here there is not even proof that the salvage operation of defendant, and its activities in transferring its customers to Cubit, had the slightest effect on plaintiff, which went out of business for totally unrelated causes.

Therefore, as a first step, this Court is bound to and does enter its *order setting aside the verdict.*

Moreover, the Court, having reviewed the evidence in the perspective of many months' consideration, must go further. Despite what this Court earlier said during the trial of the case, in the charge to the jury, and in its April 28, 1976 opinion, the Court must also, and now does, enter a *judgment for the defendant notwithstanding the verdict,* on the ground that there is wholly lacking evidence which shows that defendant had any anti-competitive intent of the kind required to maintain a claim of a *non per se* violation of Section 1 of the Sherman Anti-Trust Act. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* and *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* both *supra.*

The text of the previous paragraph and the only two citations used or needed as supporting authorities make it plain that in this Court's opinion plaintiff's case fails because of want of proof that Burroughs violated the federal anti-trust laws. Whatever may be said of (1) the Browne-Bailey correspondence, or (2) Browne's or others' representation to Burroughs' customers or to Cubit about the existence of ongoing contracts which the customers had with Burroughs, which Burroughs could delegate for performance without the acquiescence of the customers, and which Burroughs could terminate on ninety days' notice, or (3) Browne's or others' representations to a bank which lent money to Cubit, or (4) Browne's or others' representations to Burroughs' customers with respect to Cubit's capacity to do batch-data work—all those and all other representations and actions by Burroughs' agents were totally without an anti-competitive or restraint of trade intent, purpose, or effect. At most, they may have

bee in some instances representations which violated the tort law of some state; yet even this is doubtful.

Out of an abundance of caution, it is important to add that not only did Burroughs not violate federal anti-trust law, but also that nothing done by Burroughs (even if it violated state law) was a cause (large or small) of even a nominal loss sustained by CompuTerminal. The *sole* causes of loss by CompuTerminal were Palmer's misjudgment of its potential market, Palmer's mismanagement of its business due to extravagant expenditures for quarters and staff, an economic recession affecting the demand for batch-data services, want of harmony between Palmer as manager and CompuTerminal's investors, the failure of CompuTerminal to get hoped-for financing to enable it to acquire about fifty million dollars worth of equipment, and the unreliable character of Palmer.

Defendant's motions to set aside the jury's verdict and to enter judgment for defendant, notwithstanding the verdict, are both granted.

APPENDIX

THE COURT: Good morning, ladies and gentlemen of the jury.

It is exactly one month tomorrow since you first appeared in this case. I promised you that the case would last about three weeks, and I made that statement on the basis of a bona fide representations to me by counsel.

You have been, really, very faithful in attendance and, also, so far as I have observed, in attention to this case.

I want to congratulate you for having paid such close attention to a case which certainly is not the most exciting one being conducted in the United States District Court for the Northern District of California.

We have arrived at the stage at which counsel are about to address you in argument. I am, thereafter, going to charge you with rather lengthy instructions as to the applicable law. But I think it would be worthwhile for me to give you some preliminary instructions which you are to regard as part of the charge in the case.

I am going to give these preliminary instructions not with the idea of in any way foreclosing counsel's opportunity to argue fully, but to make sure that you see the bearing of the arguments as they are addressed to you.

I want to make it entirely clear that neither expressly nor impliedly have I taken any view of which side ought to prevail in this case. And I do not intend, either now or later, to indicate to you what view, if any, I have with respect to who should win this case.

I do not have to tell you that there is always a risk that jurors will infer that a judge has an attitude when he makes a ruling on some point of evidence or makes some comment to counsel. If you have inferred from anything that I have said or any nod of my head or any gesture of any tone of voice or anything else that I believe that either the plaintiff or the defendant should win this case, you are quite mistaken in that inference. When I want to tell a jury that I think the plaintiff ought to win or the defendant ought to win, I will say so. I will make it absolutely clear. And I have no intention of doing anything like that in

. . .

Appendix C

No. 77-2051

United States Court of Appeals,
Ninth Circuit.

Nov. 23, 1979.

Stuart M. Kaplan, as Trustee in Bankruptcy for Palmer Data Corporation d/b/a CompuTerminal, Plaintiff-Appellant,

v.

Burroughs Corporation,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of California.

Before HUFSTEDLER and ANDERSON, Circuit Judges, and WYATT,* Senior District Judge.

J. BLAINE ANDERSON, Circuit Judge:

Plaintiff Stuart M. Kaplan, as the Trustee in Bankruptcy for Palmer Data Corporation, doing business as CompuTerminal, appeals the decision of the court below entering judgment *non obstante veredicto* (n. o. v.) in favor of defendant Burroughs Corporation on Kaplan's action alleging a violation of Section One of the Sherman Antitrust Act, 15 U.S.C. § 1. We affirm the judgment, though on different grounds than those advanced below.

*The Honorable Inzer B. Wyatt, Senior United States District Judge for the Southern District of New York, sitting by designation.

I. BACKGROUND

Plaintiff Kaplan, as Trustee in Bankruptcy, asserts the claim of Palmer Data Corporation against the defendant Burroughs Corporation for an alleged violation of Section One of the Sherman Act, prohibiting every "contract, combination . . ., or conspiracy, in restraint of trade or commerce." Suit is brought under the "treble damages" provision of the Clayton Act, 15 U.S.C. § 15.

CompuTerminal Corporation, the original entity on plaintiff's side, was organized early in 1969, and began doing business shortly thereafter as a data processing center in San Francisco. Leonard J. Palmer, a data processing specialist with several years' worth of experience in the organization and administration of data processing centers, was primarily responsible for putting the CompuTerminal operation together.

Data processing centers generally offer a variety of accounting services to both large and small businesses. Computerized data processing supplements or often replaces traditional manual bookkeeping services such as payroll processing and client billing. In the early Seventies, data processing centers usually offered one of two types of processing plans. The "conventional" batch processing involved physical pick-up and transportation of client records from the client's place of business to the processing center, followed by the physical delivery of the finished work back to the client. The "remote" processing, on the other hand, called for a terminal or other transmitting device to be located at the client's place of business. The client could transmit the data directly to the center, and receive the work product back over a special

printer. When Palmer originally planned CompuTerminal, he had envisoned a "remote" processing center, but decided to open a less expensive "conventional" processing service with an eye to expansion.

Defendant Burroughs Corporation, a giant in the American computer manufacturing field, took over a conventional batch processing center in San Francisco in 1969 when it purchased a data processing service owned by the Sperry-Rand Corporation. Burroughs purchased the center primarily as the result of complaints it had received from many of the center's customers that the work being processed on the Burroughs B-300 computer leased by the center was not satisfactory. Burroughs was concerned with salvaging its reputation, and was also looking to building a profitable "on-line" processing service for financial institutions. Burroughs apparently made no effort to expand its batch processing operation during the time that it offered the service, and concentrated mainly upon "cleaning up" the programs for existing customers.

Burroughs' lack of enthusiasm for its newly-acquired conventional processing service became even more pronounced in early 1970 when it began losing both customers and key personnel to rival processing centers, with by far the bulk of the lost business and employees going to CompuTerminal. Executives at Burroughs shortly realized that unless a sizable investment was made, or unless the conventional batch processing service were sold completely, Burroughs would continue to lose both business and employees to CompuTerminal. Accordingly, a plan was conceived to unload the conventional batch processing business before heavier losses were incurred. Known in Bur-

roughs' executive memoranda as "Plan X," this scheme formed the basis for the antitrust claim raised in the present case.

Put simply, the object of "Plan X" was to sell Burroughs rights under existing customer contracts to another processing center before those customers went elsewhere of their own accord. In January 1970, a number of signed batch processing contracts had been obtained from Burroughs' customers, but had not been executed by Burroughs' representatives. Despite the presence of a clause in the standard batch processing contract limiting acceptance to 30 days from offer, Burroughs executives decided to refrain from signing these contracts until a buyer for the batch processing service had been obtained. The customers apparently were not notified of the decision not to sign the contracts. Burroughs, nonetheless, continued to provide batch processing service according to the terms of the contract.

In March 1970, Burroughs began approaching data processing centers in San Francisco with proposals to sell its processing customers. Among those centers approached was CompuTerminal. Burroughs executives apparently were impressed with the operations at CompuTerminal, and also favored selling the business to CompuTerminal because it was leasing from Burroughs a B-2500 computer system, considered at the time to be one of the better computers on the market. CompuTerminal, however, declined to accept Burroughs' offer to sell the center when Burroughs failed to produce the contracts with its clients. As Leonard Palmer put it at the time, without evidence of binding contracts Burroughs had nothing to sell.

Burroughs eventually reached an agreement with Cubit Systems Corporation in April 1970, whereby it sold both its batch processing customers and the B-300 computer system for $257,000. Pursuant to its agreement with Cubit, Burroughs embarked on a campaign to persuade its customers to consent to the transfer of business to Cubit. According to evidence presented below, Burroughs had approximately thirty customers under "contract" at the time of the transfer agreement with Cubit in April. Of these approximately thirty customers, close to half agreed to substitute Cubit for Burroughs after a single joint visit by representatives of Cubit and Burroughs. Approximately 30% required two joint visits before agreeing to the substitution. Among the remaining customers who failed to consent to substitution after two joint visits were made were most of Burroughs larger customers in terms of dollar volume of business. Greater pressure was applied. Early in May, a letter was sent to each of the non-consenting customers informing them that unless they consented to the transfer to Cubit, Burroughs would consider its data processing obligations "null and void." This letter was sent to four Burroughs' customers, one of whom moved to CompuTerminal shortly thereafter.

CompuTerminal apparently began to experience some difficulty in the marketplace around the time of the Burroughs-Cubit joint visits. A CompuTerminal salesman testified that potential customers began to exhibit a certain coldness to CompuTerminal and asked for assurances that the firm was financially stable. CompuTerminal's regular customers also began making inquiries as to solvency. According to the testimony of Palmer, CompuTerminal's

financial outlook turned bleak shortly thereafter as the company encountered an increasing inability to attract new accounts.

In July 1970, CompuTerminal assigned its assets over to the newly-organized Palmer Data Corporation, essentially an alter ego of Leonard Palmer. At this point, the batch processing operation was clearly struggling. The long-term plan of converting to a remote processing service had been shelved because of CompuTerminal's inability to obtain financing for the purchase of B-5500 computer systems from Burroughs. Working capital had plummeted severely, and Palmer had repeatedly warned CompuTerminal's shareholders of the need for an infusion of around $140,000 into the business in order to stay afloat.

In March 1971, Palmer Data Corporation filed an action against Burroughs Corporation alleging violations of the antitrust laws which Palmer Data claimed had produced CompuTerminal's financial nosedive. In substance, the complaint charged that Burroughs had conspired with Cubit to restrain trade by coercing Burroughs' customers to transfer their business to Cubit, and by impliedly disparaging CompuTerminal. Cubit was not named as a defendant. In November 1971, Burroughs, with Palmer Data's lease payments on the B-2500 system thousands of dollars in arreas, filed an involuntary petition in bankruptcy against Palmer Data Corporation.

II. THE PROCEEDINGS BELOW

Three separate trials have been held in this case, and the verdicts of three separate juries have been overturned.

In March 1974, following a month-long trial, a jury found in favor of the plaintiff and assessed damages against Burroughs Corporation in excess of one million dollars. The trial court ordered a new trial solely on the issue of damages.

The second trial, held in October and November of 1974, resulted in no assessment of damages against Burroughs. In February 1975, the trial court ordered a new trial *de novo* on the issues of both liability and damages. Judge Weigel, who presided at both the first and the second trial, assigned the third trial to Senior Judge Wyzanski of Massachusetts.

In January 1976, the third trial began and stretched out over a period of five and one-half weeks. The jury in the third trial found in favor of plaintiff and awarded $1,162,000 in damages. Judge Wyzanski ordered a fourth trial *de novo* in April 1976, and denied defendant's motion for a judgment *n. o. v.* After plaintiff's motion for writ of mandamus was denied by this court, plaintiff moved the district court to reinstate the earlier judgment. In February 1977, the court below entered its Findings of Fact and Opinion. In the course of that opinion, Judge Wyzanski reversed his earlier order for a new trial and entered a judgment *n. o. v.* in favor of defendant. See *Kaplan v. Burroughs Corp.*, 426 F.Supp. 1328 (N.D.Cal. 1977).

On February 9, 1977, plaintiff Kaplan filed a timely Notice of Appeal.

III. STANDARD OF REVIEW

On appeal from a judgment n. o. v., the appellate court must view the evidence in the light most favorable to the party against whom the motion is made. *Wescott v. Impresas Armadoras, S.A. Panama,* 564 F.2d 875 (9th Cir. 1977). The standards for granting a judgment n. o. v. and a directed verdict are the same, and neither should be granted unless the evidence permits only one reasonable conclusion as to the verdict. *Fountila v. Carter,* 571 F.2d 487 (9th Cir. 1978).

In order to benefit from the favorable inferences available under either the directed verdict or j. n. o. v., a party must present "substantial evidence," defined as "evidence as a reasonable mind might accept as adequate to support a conclusion." *California Computer Products v. International Business Machines,* ..... F.2d ....., slip op. pp. 2172, 2180 (9th Cir. 1979).

Our task on this appeal is the same as it was for the district judge. We must determine whether Kaplan has introduced "substantial evidence" under each element of a Sherman One antitrust action.

IV. THE RULE OF REASON

Kaplan has introduced no evidence that Burroughs committed a *per se* violation of the antitrust laws when it sold its conventional batch processing to Cubit and actively campaigned for its customers to switch their business to Cubit. None of the well-defined categories of *per se* violations is suggested by the facts. *See United States v. Socony Vacuum Oil Co.,* 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (price-fixing); *United States v. Topco Associates,*

405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) (horizontal territorial divisions); *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959) (group boycotts); *International Salt Co. v. United States,* 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947) (tying arrangements). Counsel for Kaplan conceded at oral argument that this case is not governed by any of the *per se* standards. Therefore, we analyze Kaplan's claim under the "rule of reason" standard.

The elements of a cause of action for an unreasonable restraint of trade under the rule of reason analysis of Sherman One are:

> (1) An agreement among two or more persons or distinct business entities;
>
> (2) Which is intended to harm or unreasonably restrain competition;
>
> (3) And which actually causes injury to competition; and

See generally, Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 615, 73 S.Ct. 872, 97 L.Ed. 1277 (1953); *Gough v. Rossmoor Corp.,* 585 F.2d 381, 389 (9th Cir. 1978), *cert. denied,* 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). As this court recently stated, the primary considerations in determining whether a restraint of trade is unreasonable are whether the intent of the restraint is anticompetitive and whether the restraint itself has significant anti-competitive effects. *See Sherman v. British Leyland Motors, Ltd.,* 601 F.2d 429 (9th Cir. 1979).

In granting the motion for judgment n. o. v., Judge Wyzanski emphasized a failure on the part of Kaplan to prove by substantial evidence either an intent to injure

competition or a causational link between Burrough's activities and Palmer Data's economic downfall. While we affirm the trial court's decision, we choose to base our affirmance upon grounds other than those relied upon below. We find the lack of proof of market impact and effect upon competition to be plainly inadequate as a matter of law, and express no opinion whatever on the grounds cited below.

Proof that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of the rule of reason case. It is the impact upon competitive conditions in a definable product market which distinguishes the antitrust violation from the ordinary business tort. As the Supreme Court has noted in another context, ". . . an antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53, n. 21, 97 S.Ct. 2549, 2560, n. 21, 53 L.Ed.2d 568. Failure to produce substantial evidence proving a relevant market and an injury to competition within that market entitles a defendant in a rule of reason case to a judgment n. o. v. *Gough v. Rossmoor Corp.*, supra, at 389. *Cf. Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977); *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975); *Cataphote Corporation v. DeSoto Chemical Castings, Inc.*, 450 F.2d 769 (9th Cir. 1971), *cert. denied*, 408 U.S. 929, 92 S.Ct. 2497, 33 L.Ed.2d 341 (1972); *Cornwell Quality Tools Co. v. C. T. S. Company*, 446 F.2d 825 (9th Cir. 1971),

cert. denied, 404 U.S. 1049, 92 S.Ct. 715, 30 L.Ed.2d 740 (1972).[1]

Familiar principles guide our search of the record below for evidence of proof of market definition and competitive impact. Even if sufficient proof of intent and causation are introduced, the elimination of a single competitor, standing alone, does not prove anticompetitive effect. *See Gough v. Rossmoor, supra*, at 386. Impact upon the market must be proven by reference to definitions of both the relevant geographic market and the relevant product market. *See, e.g., Chisholm Brothers Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137, 1143 (9th Cir. 1974), *cert. denied*, 419 U.S. 1023, 95 S.Ct. 500, 42 L.Ed.2d 298 (1974).

Authorities far too numerous to cite or discuss in detail have established the guidelines to determine relevant market definition. The principle most fundamental to product market definition is "cross-elasticity of demand" for certain products or services. Commodities which are "reasonably interchangeable" for the same or similar uses normally should be included in the same product market for antitrust purposes. *See generally, United States v. E. I. Du Pont De Nemours & Co.*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956) (the *"Cellophane"* case). Speaking in the context of a suit brought under Section Two of the Sherman

[1]Decisions in other circuits are equally adamant that market impact is an integral component of the rule of reason. *See, e. g., Dougherty v. Continental Oil Co.*, 579 F.2d 954 (5th Cir. 1978); *Columbia Metal Culvert, Inc. v. Kaiser Aluminum & Chemical Corporation*, 579 F.2d 20 (3d Cir. 1978), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, L.Ed.2d 190 (1978); *H & B Equipment Co., Inc. v. International Harvester*, 577 F.2d 239 (5th Cir. 1978); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975).

Act dealing with the offense of monopolization, this court has made the following observation:[2]

> "In defining the relevant market, the court must look beyond the particular commodity produced by an alleged monopolist because the relevant product market for determining monopoly power, or the threat of monopoly control, depends upon the availability of alternative commodities for buyers. Illegal monopoly does not exist merely because the production of a particular product is 'monopolized.' What is called for is an appraisal of the 'cross-elasticity' of demand in the trade."

Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1301 (9th Cir. 1978).

In *Smithkline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978), *cert. denied*, 439 U.S. 838, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978), the court offered an equally succinct explanation of the market definition process:

> "In sum, defining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market. A market definition must provide the numerator and the denominator in the fraction labelled 'market share.'"

Id. at 1063.

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[2]Generally, principles of market definition applicable to cases arising under Sherman Two are also applicable to Sherman One actions, and to merger cases arising under § 7 of the Clayton Act, 15 U.S.C. § 18.

In arriving at an adequate market definition, price differential between competing products and services is a relevant factor to consider, though price differential alone does not govern the scope of the relevant market. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., supra,* at 1274.

Similar considerations govern the definition of the relevant geographic market. The concept of alternatives reasonably available to the consumer applies with equal force to the geographic as well as to the product dimension of the market definition process. The geographic market must correspond to the commercial realities of the industry and it must also be "economically significant." *Brown Shoe Co. v. United States,* 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). Thus, physical delivery limitations and significant transportation costs, among other factors, confine the geographic market for antitrust purposes.

Included within a general product or geographic market may also be several smaller submarkets which may provide the measure of the restraint of trade in a given case. The classic exposition of the submarket concept is found in *Brown Shoe Co. v. United States, supra,* wherein the Supreme Court delineated the factors to be considered in staking out the individual submarket:

> "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct

prices, sensitivity to price changes, and specialized vendors."

Id. at 325, 82 S.Ct. at 1524.

As this court has noted, the *Brown Shoe* indicia are not to be used in a "talismanic fashion" whereby their presence or absence are regarded as mechanically dispositive of the issue. *See International Telephone & Telegraph Corp. v. General Telephone & Electric Co.*, 518 F.2d 913, 932 (9th Cir. 1975). Rather, we must approach the problem pragmatically and keep in mind *Brown Shoe's* instruction that a submarket must be "economically significant." *Brown Shoe, supra,* 370 U.S. at 325, 82 S.Ct. 1502.

Application of these general principles to the facts of the present case requires us to examine the evidence in the record with an eye to considerations such as the practical availability of different types of data processing services, both computerized and manual, cost barriers involved in switching from one type of service to another, and the percentage of business in that line of commerce involved in Burroughs' transfer of the conventional batch processing business to Cubit.

V. THE RECORD

After a thorough and careful consideration of the voluminous record in this appeal, we find that plaintiff Kaplan has failed to present substantial evidence of a relevant market, and that the motion for judgment n. o. v. was, therefore, properly granted.

Both parties were given leave to file supplemental briefs on the precise issue of relevant market. Kaplan proposed

a rather narrowly defined market which finds no support in the record. While there appeared to be evidence upon which the jury could have properly based a geographic market definition consisting of metropolitan San Francisco, and perhaps the area of the south, the lack of evidence pertaining to a product market compels our decision that the trial court's action was properly taken.

A. KAPLAN'S PROPOSED PRODUCT MARKET

In its brief, Kaplan proposes that the relevant product market be defined as all batch processors located in the San Francisco area which were using Burroughs equipment at the time of Burroughs' alleged antitrust violation. According to Kaplan's interpretation of the evidence, only four batch processing centers in San Francisco used Burroughs equipment including Burroughs center and CompuTerminal. Kaplan's breakdown of the market according to dollar volume of business is as follows:

Burroughs Data Center	$400,000 (20-30 customers)	34%
CompuTerminal ..	$385,000 (15-20 customers)	32%
Cubit Systems	$276,000 (17-18 customers)	28%
Computer Services, Inc.	$120,000 (2 or more customers)	11%
	$1,181,000	100%

Burroughs contests not only the substance of Kaplan's proposed market definition, but also the accuracy of the above figures in the context of the Kaplan definition.

Kaplan does not argue that broader markets in the data processing field do not exist. He contends, rather, that Burroughs equipment users constitute a recognizable submarket under the guidelines established by *Brown Shoe, supra,* and that we should adopt that submarket as our measure of restrained competition on appeal.

The essence of Kaplan's argument is that certain technological barriers make it difficult for a client of a data processing center which uses Burroughs equipment to switch its business to a center which uses equipment manufactured by another company. The initial cost of programming equipment to handle an individual client's particular data processing needs can represent a significant investment. Preparation on one make of computer, however, cannot be transferred to a computer of another make. One cannot communicate with the other, and a program designed for one is useless for the other. Consequently, a client who has incurred the expense of initial programming for one make of computer might be deterred from changing processing centers by the prospect of a second round of programming expenses.

Kaplan also notes that when Burroughs decided to sell its batch processing business it only contacted other data centers which used Burroughs equipment. Kaplan argues that Burroughs thus recognized the difficulties in switching computer makes. Burroughs, on the other hand, argues that its limited sales effort reflected nothing more than a natural desire to keep its own computers in business, and to refrain from diverting business to centers using rival computers.

Factually, there is no crucial weakness with Kaplan's argument. While there are unquestioned difficulties in switching programs from one make of computer system to another, there are also substantial difficulties involved in switching to different models of the same make of computer. The Burroughs data center and Cubit both used a Burroughs B-300 model, while CompuTerminal used the newer B-2500 model. According to the evidence at trial, the B-300 and B-2500 are entirely different computers, and their computer "languages" are incompatible. In many cases, a switch from a B-300 to a B-2500, or the reverse, requires complete re-programming. Thus, a market definition of Burroughs equipment users would be unrealistic because a client could no more switch from a B-300 to a B-2500 than it could from a B-300 to a Univac computer.

Kaplan, however, argues that a process known as "simulation" enables a B-2500 to run on a program designed for a B-300, and thereby brings all Burroughs computer centers into the same submarket. A "simulator" is simply a deck of programming cards which, in effect, translates a program designed for one model of computer to another. Simulators are usually made by the manufacturer of the computer and, at least in the early Seventies, were not capable of translating programs between different makes of computers.

There was testimony that simulation can cut down the cost of transferring models, at least initially. Michael Stumpf, a sales representative for CompuTerminal at the time of the Burroughs-Cubit transaction, testified that the initial costs of planning and problem definition would be eliminated by simulation.

There also was testimony, however, that the simulation process is by no means foolproof and that significant reprogramming costs might still be incurred in switching programs between different models of Burroughs computers. Leonard Palmer testified that when he considered Burroughs' offer to sell its batch processing business, he also figured in the cost of renting a B-300 in case the simulator provided by Burroughs did not function properly. Palmer also noted that in the event re-programming were required, CompuTerminal would have no "significant" competitive advantage over other data centers using different equipment with regard to the Burroughs customers.

Moreover, simulation does not place different models on the same footing in terms of efficiency. The B-2500 regarded as one of the more advanced computers in the industry in the early Seventies, had a capacity to run programs approximately twice as fast as the older and slower B-300. Simulating a B-300 program onto a B-2500, however, forced the B-2500 to operate at the B-300's lower efficiency level. Simulation thus negated the technological advantages of the B-2500 by requiring it to operate at half speed. Palmer testified that even where simulation works, re-programming must be undertaken on a "long-term" basis. Some conflicting testimony was presented on the issue of whether "larger" programs could be successfully simulated on the B-2500.

Giving Kaplan the most favorable inferences to be drawn from the evidence regarding simulation, we find that simulation was, at best, a temporary solution to the costly problem of re-programming. It was also a somewhat unsatisfactory solution in terms of reducing computer efficiency. Thus, while simulation might provide an advantage of sorts to a center using Burroughs equipment in competing for customers already programmed on a Burroughs computer, it was clearly not an advantage justifying the legal conclusion that Burroughs computer centers constituted a submarket for the purposes of the antitrust laws.

Brown Shoe compels us to examine a variety of factors in defining relevant submarkets. Kaplan bases its argument for a Burroughs-user submarket solely upon an alleged price differential. Yet, it does not appear from the evidence that Burroughs users could provide any service significantly different from that provided by users of other makes of equipment, nor does the evidence indicate that either the industry or the public recognized Burroughs as providing substantially unique data processing service. It does not appear that Burroughs appealed to any specialized clientele whose unique needs could be met only by Burroughs data processing equipment. Indeed, it appeared from the evidence that a wide variety of businesses patronized both the Burroughs Data Center and CompuTerminal, including such diverse concerns as real estate firms and insect exterminators.

Kaplan's argument also requires that we accept one implicit assumption. In defining the market as all Burroughs data centers, Kaplan necessarily asks that we disregard all potential data processing clients who were not utilizing batch processing services. Palmer's own testimony indicated that a very wide spectrum of businesses were capable of using electronic data processing at the time of the Burroughs-Cubit transaction. According to Palmer,

roughly three levels of businesses were potential data processing clients. "Larger" businesses with sizable operating capital would use batch processing in lieu of expensive in-house computer processing. "Medium"-sized businesses which could not contemplate purchase of their own computers frequently preferred using conventional batch processing to manual forms of processing. Batch processors also catered to "small" businesses who would employ "package" plans which were less expensive than more standard batch processing plans. Even if the market is geographically restricted to San Francisco, the potential clientele in 1970 appears to have been enormous. A measure of competitive impact which relied solely upon those clients already programmed on Burroughs computers would be unrealistic, to say the least.

In sum, even if we allow Kaplan all reasonably favorable inferences, we must find that Kaplan's proposed submarket does not square with the principles of *Brown Shoe*. Accordingly, we reject Kaplan's definition of the market.

B. The Data Processing Market in General

We reiterate that our decision in this appeal is entered only after a through examination of the record below. Having rejected Kaplan's proposed market definition, our review focuses upon other evidence from which a product market might be discerned.

There is literally nothing in the record from which a product market could be defined. What references to competitive conditions in the data processing industry can be found in the record tend to suggest a highly competitive market, not only among batch processors, but also among

all forms of data processing service. Sherwin Kalt, president of Diversified Computer Applications (DCA) in Palo Alto, California, testified that DCA competed with IBM data centers, the Burroughs data center, other processors in the Bay Area, banks, and purely manual forms of data processing such as traditional bookkeeping services. Leonard Palmer described the data processing field as a "changing" industry which was far from static in 1970.

Aside from such vague references to the overall data processing market, the record is silent. The great bulk of time at the third trial was spent on proof of intent and damages. The parties have all but ignored the question of market definition until this appeal. In order to arrive at a definition on appeal, we would require far more evidence than has been presented. On the question of "reasonable interchangeability," we would have to see more detailed evidence on both cost and convenience of batch processing and alternative data processing procedures, both computerized and manual. In assessing the impact of the Burroughs-Cubit transaction on competition, we would require a far more complete picture of the data processing market in San Francisco, including some reasonable estimate of the potential for new entrants into the field. In short, we feel absolutely incapable of making even a rough estimate of the effect of Burroughs' allegedly illegal activities upon competition in such a highly technical and dynamic industry on the basis of this record. As a matter of law, the jury was similarly incapable of judging.

VI. CONCLUSION

Finding that plaintiff Kaplan failed to present substantial evidence on a critical element of its cause of action, we find that defendant's motion for judgment n. o. v. was properly granted.

AFFIRMED.

Appendix D

In the United States Court of Appeals
For the Ninth Circuit

No. 77-2051

Stuart M. Kaplan, as Trustee in Bankruptcy for Palmer Data Corporation d/b/a CompuTerminal,
Plaintiff-Appellant,

vs.

Burroughs Corporation,
Defendant-Appellee.

[Filed Jan. 25, 1980]

ORDER

Before: HUFSTEDLER* and ANDERSON, Circuit Judges, and WYATT,** Senior District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Shirley M. Hufstedler, now Secretary of Education, did not participate in the deliberations on the post-decision petitions.

**The Honorable Inzer B. Wyatt, Senior United States District Judge for the Southern District of New York, sitting by designation.